Province of
British Columbia

1983

Report on
Illegal Transactions

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON ILLEGAL TRANSACTIONS

LRC 69

November 1983

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

The Commissioners are:

THE HONOURABLE MR. JUSTICE JOHN S. AIKINS, *Chairman*

ARTHUR L. CLOSE, *Vice Chairman*

BRYAN WILLIAMS

ANTHONY F. SHEPPARD

RONALD I. CHEFFINS

Thomas G. Anderson is Counsel to the Commission.

Frederick W. Hansford is Staff Lawyer to the Commission.

Sharon St. Michael is Secretary to the Commission.

The Commission offices are located on the Fifth Floor, Toronto Dominion Tower, 700 West Georgia Street, Vancouver, B.C. V7Y 1C6.

Canadian Cataloguing in Publication Data

Law Reform Commission of British Columbia
Report on illegal transactions

Includes bibliographical references.
"LRC 69".
ISBN 0-7718-8401-X

1. Illegal contracts - British Columbia. I. Title.

KEB252.A72L38 1983 346.711'022 C84-092025-3

TABLE OF CONTENTS

	Page
I Introduction	1
A. Background	1
B. Terminology	2
C. The Scope of the Report	3
II The General Rule	4
A. Introduction	4
B. Unenforceability	4
C. Non-intervention	5
D. Non-contractual Transactions	6
E. Exceptions to the General Rule	8
III Freedom of Action vs. Public Policy	9
A. Introduction	9
B. Statutes	9
1. Transactions Specifically Prohibited by Statute	9
2. Transactions Contravening the Policy of a Statute	12
C. Transactions Illegal under Foreign Law	15
1. Contracts	15
(a) Illegality by the Law of the Forum	16
(b) Illegality by the Proper Law	16
(c) Illegality by the Law of the Place of Performance	17
(d) Evasion of Inconvenient Laws	18
2. Other Transactions	19
D. Transactions Contravening the Policy of the Common Law	20
IV Does the Transaction Infringe Public Policy?	22
A. General	22
B. Where One Party to the Transaction has a Locus Poenitentiae	22
C. Where the Parties Act under a Mistake of Fact or Law	24
D. Where the Transaction Could be Performed Innocently	25
E. The Transaction has a Tendency to Contravene Public Policy	27
1. Generally	27
2. Agreements to Abstain from Doing an Act Where the Law does not Impose a Duty to Act but does Disapprove of Trafficking in Inaction	27
3. Agreements to Do an Act Which is Legal, But Which is Held to Promote a Tendency Towards a Result Which is Contrary to the Policy of the Law	28
4. Agreements to Do an Act Which is Legal, But Which is Intended (By One or Both Parties) to Provide a Setting for an Act, Which is Contrary to the Policy of the Law	29
V Exceptions to the General Rule	30
A. Introduction	30
B. The Parties Are Not In Pari Delicto	30
C. The Plaintiff Is a Member of a Protected Class	31
D. The Plaintiff Need Not Rely on the Illegal Transaction	32

Page

E. Severance 34
1. Generally 34
2. Express Severance 34
3. In the Absence of Agreement 34
(a) Generally 34
(b) Technical Possibility 35
(c) Imputed Intention 37
F. The Duty to be Honest 37

VI The Effect of Illegality 39
A. Generally 39
B. Unenforceability 39
C. The Rule of Non-intervention 41
D. The Passing of Title Under an Illegal Contract 42

VII The Need for Reform 49
A. Generally 49
1. Introduction 49
2. An Evaluation of the Policy Grounds Advanced in Support of the General Rule 49
(a) The Courts Should not Assist in Enforcing the Illegal Contract 50
(b) Punishment 50
(c) Deterrence 50
(d) The Plaintiff Has "Polluted Hands" 50
3. The Need for Reform 52
(a) The Current Law Leads to Unjust Enrichment 52
(b) The Current Law is Technical and Uncertain 52
B. Options for Reform 53
1. Judicial Reform 53
2. Remove the Bar Prohibiting Relief 54
3. A Discretionary Power 55

VIII A Power to Grant Relief 57
A. Introduction 57
B. The Relationship Between an Illegal Transaction Act and the Present Law 57
1. Should the Present Exceptions and Qualifications to the General Rule be Preserved? 57
2. The Relationship Between an Illegal Transaction Act and Other Legislation 59
(a) When Should Specific Legislation Override an Illegal Transaction Act? 59
(b) To What Types of Legislation Should an Illegal Transaction Act Apply? 61
C. The Application of an Illegal Transaction Act 63
1. "Contract," "Transaction" and "Property" 63
2. Illegal Transactions 64
3. Transactions Invalidated by an Enactment 68
(a) Interpretation 68
(b) "Performance" 70
4. Transactions with Severable Provisions 71

Page

5. Transactions to Which an Illegal Transaction Act Should Not Apply 71
(a) Generally 71
(b) Transactions Invalid Against Creditors or Others by Reason of a Failure to Register (Appendix D (3), (10)) 71
(c) Transactions in Respect of Which no Action may be Brought by Reason of the Effluxion of Time (Appendix D (6)) 72
(d) Transactions or Provisions in Transactions Rendered Invalid if not Evidenced by a Memorandum in Writing or Signed by the Party to be Charged, or his Agent (Appendix D (7)) 72
(e) Transactions Rendered Invalid by Reason of the Creation or Vesting of a Right After a Specified Period of Time (Appendix D (12)) 72
(f) Transactions Avoided by Frustration (Appendix D (13)) 72
(g) Transactions in Restraint of Trade 72
(h) Minors' Contracts 73

D. Remedies Under an Illegal Transaction Act 73
1. Generally 73
2. Is a Specific List of Remedies Desirable? 74
3. Types of Remedies 74
(a) Validation 74
(b) Variation 76
(i) Generally 76
(ii) A Power to Vary by Rewriting the Transaction 77
(iii) Partial Validation 77
(iv) Severance 77
(c) Restitution 78
(d) Compensation 78
(e) Apportionment of Loss 78
(f) Orders to Vest or Transfer Property 79
4. Terms and Conditions 80
5. Factors Influencing the Exercise of the Discretion to Grant Relief 80

E. The Effect of Illegality 80
1. Generally 80
2. Should Title Pass Under an Illegal Transaction? 81
(a) Security of Title 82
(b) Section 6 is Anomalous 82
(c) Section 6 Preserves an Undesirable Aspect of the Current Law 82

F. Which Tribunals Should Have the Power to Grant Relief? 83

G. Transition 84

IX Conclusions 85

A. General 85

B. List of Recommendations 85

C. A Draft Illegal Transaction Act 88

D. Acknowledgments 88

Page

Appendices 89

A. Enactments Invalidating Contracts 89

B. Enactments Providing for Relief 94

C. New Zealand Illegal Contracts Act, 1970 107

D. Categories of Invalidating Contracts 110

E. A Draft British Columbia Illegal Transaction Act 114

To the Honourable Brian R. D. Smith, Q.C.,
Attorney General of the Province of British Columbia

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON ILLEGAL TRANSACTIONS

As a general rule, Canadian courts decline to grant relief to parties who have either deliberately or unwittingly entered into an "illegal" transaction. The law concerning when a transaction may be characterized as illegal, and the exceptions to the general rule, is uncertain and inconsistent. It may be doubted whether the drastic results which flow from characterizing a contract as "illegal" are necessary to uphold public policy. In this Report, we examine the general rule governing illegal transactions and make recommendations for its reform.

A. Background

In this Report, we examine the common law governing the rights of parties to illegal transactions. By "transactions" we mean not only contracts, but also non-contractual arrangements such as trusts and gifts. The rules governing illegal transactions are centuries-old and were formulated at a time when the regulation of society by legislation was not as commonplace as it is today. Moreover, the law governing illegal transactions has developed largely in the context of contracts and its application to transactions which do not fall within a technical definition of "contract" requires re-examination.

Many judges have expressed disquiet about the rules governing illegal transactions and have suggested that they are in need of reform. In *Todd* v. *Parker*, a New Zealand case, F. B. Adams J. stated:[1]

> There are some aspects of the law relating to illegal contracts which might well be borne in mind by those responsible for legislation. I say nothing in regard to any statute in particular, but the severity of the consequences which sometimes flow from the statutory invalidation of contracts is sometimes out of proportion to practical requirements.[2]

In British Columbia, the disarray of the law governing illegal transactions, and specifically illegal contracts, has also been the subject of some judicial comment. In *Mira Design Co. Ltd. et al.* v. *Seascape Holdings Ltd.*,[3] the petitioner in a foreclosure action was met by the defence that the mortgage was illegal since the effective rate of interest was in excess of 60% per annum, contrary to section 305.1 of the Criminal Code.[4] Huddart L.J.S.C. noted:[5]

> These arguments take one into an area of the law that is not well developed theoretically, where the cases are difficult to reconcile and the distinctions largely artificial.

This subject has been examined by several law reform agencies. In New Zealand, the Contracts and Commercial Law Reform Committee issued a Report on Illegal Contracts in 1969.[6] Its recommendations were implemented in an *Illegal Contracts Act* (1970). In South Australia the Law Reform Committee also examined the law governing illegal contracts and recommended the enactment of legislation similar to that in force in New Zealand.[7]

In South Africa judicial dissatisfaction with the rule led to its restatement. In *Jajbhay* v. *Cassim* the Supreme Court of South Africa questioned the rationale underpinning the common law approach to illegal contracts:[8]

---

[1] [1953] N.Z.L.R. 39 at 47, 48. *See also Chitts* v. *Allaine*, [1982] Qd. R. 319, vol. 9 Commonwealth Law Bulletin, No. 3 (July, 1983) 866 (Qd. S.C.) in which it was stated by Macrossan J. *per curia*:

> There are notorious difficulties and there can be injustices surrounding the rules which have been evolved by the courts to deal with contracts which are illegal or unenforceable. Difficulties in doing justice between parties to a contract can arise for the very reason that contracts are declared to be wholly void for illegality in cases where the parties are not equally to blame or where the illegality arises from a statutory provision designed to protect the general public or persons in a particular class. It is hard not to feel that the results achieved would have been better if consequences were not determined quite so automatically as for the illegality but were determined more according to what public policy would seem to require in the particular case.

[2] In like fashion, Woods J.A. of the Saskatchewan Court of Appeal stated in *Thompson* v. *Biensch*, [1980] 6 W.W.R. 143, at 143-144:

> To me it has never seemed right that a defendant who is in pari delicto with the plaintiff in some element of fraud or illegality against a third party should be able to effect substantial gain for himself as against the plaintiff in defeating an otherwise valid claim by the simple expedient of raising the wrong to which he himself was party. However, the Supreme Court of Canada in *Zimmerman* v. *Letkeman*, [1978] 1 S.C.R. 1097, [1977] 6 W.W.R. 741, 79 D.L.R. (3d) 508, 17 N.R. 408, made strict application of the maxim ex turpi causa non oritur actio.

[3] [1982] 4 W.W.R. 97 (B.C.S.C.).

[4] R.S.C. 1970, c. C-34, as amended 1980-81-82, c. 43, s. 9.

[5] *Supra*, n. 3 at 100.

[6] Published in October, 1969.

[7] *37th Report Relating to the Doctrines of Frustration and Illegality in the Law of Contract*, 1977.

[8] [1939] A.D. 537 at 541-42, *per* Stratford C.J.

> It may be said that contracts of that nature are more discouraged by leaving the bereft plaintiff unhelped and the doubly delinquent defendant in possession of his ill-gotten gains. I cannot agree with this view, which I think would not so much discourage such transactions but would tend to promote a more reprehensible form of trickery by scoundrels without such honour as even thieves are sometimes supposed to possess, and public policy should properly take into account the doing of simple justice between man and man.

This Report is in large measure based upon our Working Paper No. 38 "Illegal Contracts," published in November 1982. We are grateful to those of our correspondents who wrote to us commenting on the Working Paper, and it will be readily apparent that their comments had a significant impact on our proposals.

B. Terminology

Throughout this Report, we shall refer to the terms "illegal transaction," "illegal contract," and the "general rule" concerning illegal contracts. While these terms are convenient, they are somewhat misleading.

First, the word "illegal" is not entirely appropriate. A wide variety of arrangements may be termed "illegal" for different reasons. If legislation expressly forbids the formation of a specific contract, that contract is obviously "illegal." However, the term is also used in respect of contracts whose formation is not forbidden. For example, a contract which violates a policy synthesized by a judge from common law cases is also characterized as an "illegal contract." The term "illegal" is thus used as a convenient shorthand expression, signifying that the transaction so designated is one which a court will decline to enforce on the ground that it infringes some public policy, or the terms or object of an enactment.

In the recent decision of the Supreme Court of Canada in *Hydro Electric Commission of Nepean* v. *Ontario Hydro*,[9] Estey J. on behalf of the majority, refused to characterize a contract as "illegal" merely because it was not authorized by the statute incorporating Ontario Hydro:[10]

> As was noted when examination of other authorities, this cannot be classified as an illegal transaction as neither party has offended any prohibition in law but rather each party has respectively asked for and paid a charge not included in the statutory term "cost."

The term is not, therefore, capable of indefinite expansion.

Second, although in the vast majority of cases the question of illegality will be raised in the context of a contractual dispute, the general rule we shall describe later in this Report applies with equal force to cases where the relationship between the parties does not fall neatly into the rubric of "contract." Property or some other benefit may be transferred under an arrangement between parties in which no offer is made, acceptance communicated, or in which no consideration passes. It is for this reason that we have entitled this Report "Illegal Transactions" rather than "Illegal Contracts." However, in recognition of the fact that most problems arise with "illegal contracts" we shall use the term "illegal contract" rather than "illegal transaction" whenever the case being discussed deals with a contract, although the law in issue in that case may also apply to a non-contractual illegal transaction.

Third, there is some controversy about the effect of characterizing a transaction as "illegal." Although this is an issue which we shall examine in a later chapter, the significance of much of our discussion of the current law may

[9] (1982) 132 D.L.R. (3d) 193, 41 N.R. 1; 16 B.L.R. 215 (S.C.C.).
[10] *Ibid.* at 239 (D.L.R.)

be lost without some appreciation of the general attitude of the courts to illegal transactions. We shall accordingly examine the content of the "general rule" governing such transactions in Chapter II of this Report.

C. The Scope of the Report

As Huddart L.J.S.C. noted in the *Mira Design Co. Ltd.* case,[11] an examination of the law respecting illegal contracts is hindered by the lack of any generally accepted analytical framework. Another commentator has stated that:[12]

> The diversity of the fields with which public policy is concerned, and of the circumstances in which a contractual claim may be affected by it, combine to make this branch of the law of contract inevitably complex — a complexity which has been aggravated by lack of systematization and by the confusing terminology which has often been adopted.[13]

The complexity of the law and its lack of systemization complicate any examination of the rules governing illegal transactions. Much debate has centred on questions involving the categorization of various heads of public policy. Rather than enter into the debate surrounding the classification of illegal transactions, we have chosen instead to concentrate on the manner in which courts deal with illegality. Little appears to turn on the classifications of illegal contract adopted by various writers.

Despite the lack of any uniform terminology or standard analytical framework, it is possible to glean from the authorities four main issues which courts must consider when the defence of illegality is raised in an action:

1. Does the public policy allegedly infringed outweigh the general policy of the law favouring freedom of action?
2. Did the parties in their agreement actually infringe that policy?
3. Do the parties fall within an exception to the general rule?
4. What is the effect of characterizing the transaction as illegal?

In this Report, we shall examine the approach taken by the courts to each of these issues. We shall also critically examine the current law as well as reform legislation enacted in other jurisdictions. Finally, we make recommendations for reforming the law of British Columbia governing illegal transactions.

One type of contract that is categorized as being against public policy, but which is not examined in this Report, is a contract containing a covenant in restraint of trade. This type of contract raises issues different from those which arise in connection with other contracts that infringe public policy, and should, in our view, be treated separately. For this reason we will issue a separate Report examining contracts in restraint of trade with appropriate recommendations for reform.

---

[11] *Supra*, n. 3, 5.

[12] M.P. Furmston, *The Analysis of Illegal Contracts* (1966) 16 U. of T.L.J. 267 at 268.

[13] In *Sidmay Ltd.* v. *Wehttam Investments Ltd.*, [1967] 1 O.R. 508, 61 D.L.R. (2d) 358, Laskin J.A. (as he then was) doubted, at 534 (O.R.), whether "a single rationalizing principle can be applied to the English money-lender cases, or, indeed, to cases on illegality in general."

A. Introduction

Throughout this Report, we shall refer to "the general rule" governing illegal transactions. It is therefore convenient to define at the outset what we mean by "the general rule."

A review of the reported cases indicates that the rule has two heads. First, an illegal transaction is unenforceable by action. Second, a court will not, except in exceptional cases, intervene to assist a party to an illegal transaction, even when he seeks to resile from the transaction.

The two heads of the rule are said to rest on two Latin maxims; the first on the maxim *ex turpi causa non oritur actio* (no action arises out of a wrongful cause) and the second; *in pari delicto, potior est conditio defendentis* (the parties being equally in the wrong, the defendant prevails). As the Supreme Court of South Africa noted in *Jajbhay* v. *Cassim*[1] these two rules have been conflated in English law, such that the rule of unenforceability has become a rule of non-intervention.[2] Nevertheless, courts in England and Canada have declined to adopt a comparable analysis and *Jajbhay* v. *Cassim* appears to have been largely ignored.

We now turn to an examination of the two heads of the general rule, first as it applies to an illegal contract and secondly, as it applies to non-contractual transactions.

B. Unenforceability

It is well established that courts will neither enforce an illegal contract nor grant a remedy for its breach. Claims for damages, rescission, and specific performance have all been refused where the contract was illegal. The rationale for this approach was stated by Lord Mansfield in *Holman* v. *Johnson* as follows:[3]

> The objection, that the contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not

[1] [1939] A.D., 537.

[2] *See* the judgment of Stratford C.J., *supra*, n. 1 at 542-543:

> I repeat that the two maxims, although they have a common inspiration and purpose, are clearly distinct in that they deal with different types of claim. The maxim *ex turpi causa* is self-explanatory and requires no elucidation. It is complete and unquestioned in our Courts as in the Courts of England. But we must leave it in its own department where it reigns supreme and not unwarrantably extend it to the province of the other maxim which is designed to supplement and deficiencies of the first in regard to deterring illegality. The two separately operating and properly applied are, I venture to think, adequate for that designed purpose. When I say that the law is not settled, I mean in regard to the application only of the second maxim *in pari delicto potior conditio defendentis*. This is the only maxim which, in my judgment, concerns us in the present case, for the appellant is not seeking enforcement of the illegal contract but seeks release from its operation. This maxim is not so self-explanatory as the first, for the nature of the plaintiff's claim is not immediately indicated and the degree and nature of delinquency is but vaguely defined. Nevertheless it is, I think, obvious that its purpose is that which I have mentioned above. To trace the maxim from its origin (the Digest) up to its emergence into the light of every day application in Courts of law will not assist us, for in this last stage of application to concrete cases we see that the right of recovery of something delivered under an illegal contract (a *restitutio in integrum*) has never been denied in all cases. In other words the maxim has not, in modern systems of law, been rigidly and universally invoked to defeat every claim by one of two delinquents to recover what he has delivered under such a contract.

[3] (1775) 1 Cowp. 341 at 343, 98 E.R. 1120 at 1121.

> for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*.

The classic example of litigation involving an illegal arrangement is *Everet* v. *Williams*,[4] in which a highwayman brought a bill in equity to obtain an accounting against his partner. The bill was dismissed as being "scandalous and impertinent." The court went on to hold the plaintiff's solicitors in contempt of court, fined them, and committed them to Fleet prison pending payment of the fine.[5]

The unenforceability of illegal contracts is well established in both England[6] and Canada.[7] The rule as to unenforceability has been expounded and applied in a number of decisions of the Supreme Court of Canada,[8] a recent example being *Zimmerman* v. *Letkeman*.[9] In that case, the plaintiff sought an order for specific performance of a contract for the sale of an apartment block. The parties misrepresented the sale price of the apartment block in the documentation evidencing the sale so the respondent could use the documents to qualify for a mortgage greater than the prospective mortgagee would otherwise grant. Both parties intended that the documents be used to deceive the mortgagee. The court held that as the appellant could not bring himself within an exception to the general rule, any claim based on a contract intended partly to defraud a third party must fail. Accordingly, an order for specific performance of the contract was denied.

It is equally clear that the courts will not permit the indirect enforcement of illegal contracts. The Supreme Court of Canada, for example, has declined to award damages for breach of a contract entered into for a fraudulent purpose, on the basis that to award damages for breach of contract would be in effect to enforce it.[10] Similarly, a court will refuse to order an accounting for money due under an illegal contract, and will set aside an arbitration award made under an illegal contract.[11]

C. Non-Intervention

Not only do courts refuse to enforce an illegal transaction; they also refuse to assist parties to it in any manner. A person who seeks to recover money paid under an illegal contract is not seeking to enforce the agreement. In fact, seeking a refund is a clear repudiation of the obligations imposed by an illegal contract. However, unless the plaintiff can show that he falls within some exception to the general rule, the court will not assist him.[12]

In *Berg* v. *Sadler and Moore*,[13] for example, the plaintiff, a former member of a Tobacco Trade Association, had been placed on the Association's stop list and was unable to purchase cigarettes from any member of the

---

[4] *See* (1893) 9 L.Q. Rev. 197, G.B. Klippert, *Unjust Enrichment*, 1983, at 337.

[5] A.H. Manchester, Modern Legal History (1980), at 66.

[6] Goff & Jones, *The Law of Restitution*, (2nd ed. 1978), at 324 (hereafter Goff & Jones).

[7] Fridman, *The Law of Contract in Canada* (1976), at 383; *Marriette Agencies Ltd.* v. *Georgia Gulf Estates Ltd.*, (1964) 44 D.L.R. (2d) 242, 47 W.W.R. 89, (B.C.S.C.); *U.S. Fidelity & Guarantee Co.* v. *Cruickshank*, [1919] 3 W.W.R. 821, 12 Sask. L.R. 477, 49 D.L.R. 674 (Sask. C.A.); *Thompson* v. *Biensch*, [1980] 6 W.W.R. 143 (Sask. C.A.); *Hydro Electric Commission of Nepean* v. *Ontario Hydro*, (1982) 132 D.L.R. 193 at 204 *per* Dickson J. (S.C.C.); *Elford* v. *Elford*, (1922) 69 D.L.R. 284, 64 S.C.R. 125, [1922] 3 W.W.R. 339; *Clark* v. *Hagar*, (1894) 22 S.C.R. 510; *Commercial Life Assurance Co.* v. *Drever*, (1948) S.C.R. 306, [1948] 2 D.L.R. 241; *Consumers Cordage Co.* v. *Connolly*, (1901) 31 S.C.R. 244.

[8] *See, e.g., Bank of Toronto* v. *Perkins*, (1883) 8 S.C.R. 603; *Major* v. *C.P.R.*, (1922) 64 S.C.R. 367.

[9] [1978] 1 S.C.R. 1097, 79 D.L.R. (3d) 508.

[10] *Antoine Guertin Ltee.* v. *Chamberland Co. Ltd.*, [1971] S.C.R. 385.

[11] *See generally* 9 Halsbury (4th Ed.), para. 430, at 296.

[12] *See e.g. Perkins* v. *Jones*, (1905) 7 Terr. L.R. 103, and *Annotion: Illegality as Affecting Remedies*, (1913) 11 D.L.R. 195.

[13] [1937] 2 K.B. 158 (C.A.).

Association. Nevertheless, the plaintiff attempted to obtain cigarettes from a member by conduct amounting to false pretences. The defendant, after having accepted payment for the cigarettes, became suspicious and declined to tender thegoods or return the money. The plaintiff's action to recover his money was dismissed.

In a recent British Columbia case, *Tannock* v. *Bromley*,[14] Bouck J. refused to allow a plaintiff to recover fees paid to an unqualified medical practitioner. He held:[15]

> The nature of the plaintiff's claim under this head falls within the law relating to illegal contracts. As the plaintiff knew the defendant was not a medical doctor he cannot recover the $600 he paid for treatment on the ground of mistake or of failure of consideration. He must show fraud or misrepresentation. On the evidence there is no such fraud or misrepresentation by the defendant.

The refusal to grant restitution also extends to transfers of land or chattels.[16] Furthermore, it is clear that a plaintiff may not avoid the general rule by ignoring the contract and seeking to recover the value of services performed or goods transferred under the illegal contract by invoking a restitutionary remedy, such as *quantum meruit* or *quantum valebat*.[17]

D. Non-contractual Transactions

It is well established that the general rule formulated in respect of illegal contracts is equally applicable to cases wherein the transaction cannot be characterized as a contract. In *Scheuerman* v. *Scheuerman*,[18] the plaintiff had made a fraudulent conveyance to the defendant, who refused to reconvey the subject lands on request, as agreed. The plaintiff argued that a resulting trust had arisen in his favour. It was held by the Supreme Court of Canada that no resulting trust arose because of the plaintiff's unlawful intent to avoid his creditors. In language broad enough to cover transactions other than trusts, Fitzpatrick C.J.C. stated:[19]

> I am prepared to hold that plaintiff is not entitled to come into Court and ask to be relieved of the consequences of his actions done with intent to violate the law, and that though they did not and even could not succeed in this purpose.

Idington J. agreed:[20]

> Many authorities have been cited which I have, in deference to the argument and divided opinions below, fully considered. But from none of them can I extract authority for the proposition of law that when a man has, out of sheer necessity to prove anything upon which he can hope to rest the alleged claim of trust, to tell of an illegal purpose as the very basis of his claim, that he may yet be entitled to succeed.

It should be noted that the language used in the *Scheuerman* case is conducive to the extension of the general rule to cases of express trusts to effect an illegal purpose.

The absolute nature of the prohibition against reliance on the doctrine of resulting trust to aid in the recovery of property transferred under an illegal transaction was recently re-examined by the Supreme Court of Canada. In *Goodfriend* v. *Goodfriend*,[21] the majority of the Supreme Court of Canada per

---

[14] (1979) 10 B.C.L.R. 62 (B.C.S.C.).

[15] *Ibid.* at 71; *see also Hasiuk* v. *Oshanek*, [1935] 3 W.W.R. 385, [1936] 1 D.L.R. 232 (Man.C.A.); *Clark* v. *Swan*, (1914) 19 B.C.R. 532.

[16] *See* Goff & Jones, at 324 *et seq.*, *Chitty on Contracts, General Principles*, (24th Ed. 1977) at 487 *et seq.*, Fridman and McLeod, *Restitution*, 1982 at 444.

[17] *Commercial Life Assurance* v. *Drever*, *Supra*, n. 7.

[18] (1916) 28 D.L.R. 223, 52 S.C.R. 625.

[19] *Ibid.* at 224 (D.L.R.).

[20] *Ibid.* at 225 (D.L.R.) *see also Rosenburger* v. *Thomas* (1852) 3 Grant's Chancery Reports 635.

[21] 22 D.L.R. (3d) 699 (S.C.C.)

Laskin J. accepted that the general rule applied, but held that the plaintiff husband could recover land transferred to the defendant wife to avoid creditors because the scheme was concocted and implemented by her, and hence the parties were not *in pari delicto*.[22] The minority, per Spence J. held that even if the grantor had the requisite fraudulent intent, the fact that no creditor was in fact defrauded took the case outside the general rule.

It would appear that the enforceability of a resulting trust in favour of a fraudulent debtor, where no creditor is in fact prejudiced, is not yet settled.[23] The issue is complicated to some extent by Spence J.'s apparent refusal in a subsequent case to follow his own decision in *Goodfriend*, where it was open to him to do so.[24]

Quite apart from the confusion surrounding trusts to defraud creditors, it is well established that trusts to effect illegal purposes are subject to the general rule, and that trustees may retain the trust corpus for their own beneficial use, provided that:[25]

> [the settlor's] . . . conduct . . . in creating the trust was of such a character that it is against public policy to permit him or his successors in interest to recover the property.

In *In re Great Berlin Steamboat Company*,[26] a decision of the English Court of Appeal, the appellant had placed £1000 in a bank account maintained by the company in order that it might appear creditworthy should German investors investigate. The company agreed by resolution to hold the funds on trust for the appellant. Nevertheless, the court held that the trustee was entitled by reason of the appellant's fraudulent intent to apply the funds to its own purposes, and that it need not account to the appellant. In the result the trustee (or to be more precise, the company's receiver) was held entitled to use the money for its own benefit.

However, as Goff & Jones note[27] it is "[a]t first sight . . . odd" that a trustee should be allowed to benefit from the trust, and accordingly courts will be diligent in giving effect to a resulting trust in favour of the settlor where possible, rather than applying the general rule. This may be done either by characterizing the settlor's conduct as not contrary to public policy or by applying an exception to the general rule.[28]

Although the main application of the general rule outside of contracts is in the law of trusts, it is clear that illegality is generally a bar to any

---

[22] For a discussion of this exception, *see post*, Chapter IV.

[23] In the following cases, the court held that even though the Plaintiff had the intent to defraud creditors, relief could be granted if the illegal purpose was not effected:

Kovacs v. *Kovacs*, (1974) 13 R.F.L. 255 (Ont. S.C.)
Bible v. *Bible*, (1974) 15 R.F.L. 105 (Ont. C.A.)
Sinclair v. *Sinclair*, (1975) 17 R.F.L. 202 (Ont. S.C.)
Marks v. *Marks*, (1975) 18 R.F.L. 323 (Ont. C.A.)
Re Warenko and Young, (1976) 61 D.L.R. (3d) 168 (Man. Q.B.)
David v. *Szoke*, (1974) 39 D.L.R. (3d) 707 (B.C.S.C.) This position has some Australian support: *see* *Martin* v. *Martin*, (1959) 33 A.L.J.R. 362.

In contrast, in the following cases, the court held *per contra* that the question of whether the illegal purpose was effected was irrelevant:

Maysels v. *Maysels*, (1974) 45 D.L.R. (3d) 337 (Ont. C.A.)
Foster v. *Foster*, (1978) 98 D.L.R. (3d) 390 (B.C.S.C.)
Bingeman v. *McLaughlin*, (1977) 28 R.F.L. 58 (S.C.C.)

[24] *Bingeman* v. *McLaughlin*, (1977) *supra*, n. 23. He held that the case was distinguishable from *Goodfriend* because the grantor in *Bingeman* shared the requisite fraudulent intent. But *cf. Foster* v. *Barry*, [1983] 5 W.W.R. 315 (B.C.S.C.) in which a fraudulent grantor brought action against his solicitor whom, it appears, was adjudged *prima facie* negligent in not advising his client before the transfer took place that the property would be irrecoverable.

[25] A.W. Scott, *Scott on Trusts*, 1939, Volume III, at 2196 (para. 422). *See also* Goff & Jones, *The Law of Restitution*, 2nd Edition, 1978, at 398, *Case Comment* on *Munro* v. *Morrison*, ([1980] V.R. 83), (1981) 55 Aus. L.J. 292 by J.C. Phillips.

[26] (1884) 26 Ch. D. 616 (C.A.).

[27] *Supra*, n. 25.

[28] It should be noted that testamentary trusts are regarded as executory and illegality therefore brings about a resulting trust, *see* Goff & Jones, *supra*, n. 25.

restitutionary proceeding, whether or not founded on contract. It applies, for example, to claims for contribution,[29] to gifts[30] and to claims for subrogation.[31] As Goff & Jones note:[32]

> A restitutionary claim will fail if it is against public policy to enforce it. There are many illustrations of this limiting principle . . . Illegality may also be pleaded as a bar to restitution. The court will not assist a party who has to rely upon an illegal act as a necessary part of his claim. The principal examples of the application of that defence are to be found in the cases where a party seeks to recover benefits rendered under a contract ineffective because of illegality. But other instances occur throughout the law of restitution; for example a contribution claim may be defeated on that ground.

In *Canada Cement LaFarge Ltd. et al.* v. *British Columbia Lightweight Aggregate Ltd.*,[33] Estey J. took the opportunity to state the general rule in a broad fashion. In that case the plaintiff, British Columbia Lightweight Aggregate Ltd., alleged that it was the victim of a conspiracy to injure it arising out of the arrangement between the defendants which amounted to an illegal combine. It was held that even though the plaintiff was not a party to the arrangement, its claim would have been barred had it elected to participate in the profits the combine engendered. Estey J. held *per curia*:[34]

> In the present case the plaintiff-respondent clearly sought to avail itself of the benefits apparently attendant upon an ordinary market which has been neatly shared by the members of an illegal combine. The benefit falling to the respondent was the opportunity to be the sole supplier of lightweight aggregate to the combine. If the damages which have been suffered by the respondent flowed from its involvement in the illegal combine or from the contracts entered into between the respondent and the appellants affordng the opportunity to the respondent to participate in the combine, then these doctrines prevent the respondent's recovery. On the other hand, if there is not a sufficient causal link between the respondent's participation in the illegal control of the market and the decline and eventual failure of its business, then these doctrines do not operate to provide a further basis for denying the respondent's claim. Without the causal link, of course, the respondent would have no cause of action. It would appear that in these unusual circumstances the respondent must fail whichever way his claim is advanced.

He concluded:[35]

> If the loss suffered by the respondent was occasioned by his voluntary participation in an illegal transaction, the Courts should not come to his assistance. This does not seem to have been the case, however. In any event, since the respondent's loss was not caused by the appellants' actions pursuant to their illegal transaction, there is no basis upon which the respondent can recover in the Courts.

E. Exceptions to the General Rule

It is an overstatement to say that the general rule is applied automatically. The draconian consequences which often ensue from its strict application have led courts to apply it in a restrictive and technical fashion. In addition, a number of exceptions have been formulated which collectively deprive the general rule of much of its force. We examine these qualifications and exceptions in later chapters.

---

[29] Goff & Jones, *supra*, n. 25 at 39.
[30] *Jackson* v. *Jackson* (1961) 26 D.L.R. (2d) 686 (B.C.S.C.).
[31] *Orakpo* v. *Manson Investments Ltd.* [1978] A.C. 95, [1977] 3 W.L.R. 229, (H.L.).
[32] *Supra*, n. 29.
[33] (1983) 24 C.C.L.T. 111 (S.C.C.).
[34] *Ibid.* at 130.
[35] *Ibid.* at 131.

CHAPTER III FREEDOM OF ACTION VS. PUBLIC POLICY

A. Introduction

In this chapter, we examine the first major issue facing a court when illegality is pleaded. In most cases, a defendant who seeks to take advantage of the general rule will argue that a transaction is contrary to "public policy." The "public policy" in issue may be expressed in a statute, or it may be synthesized from common law cases. Whatever the source of the illegality pleaded, the court has to balance the policy allegedly infringed with the general policy of the law favouring freedom of action in order to determine if the transaction is one which ought to be enforced, or in respect of which relief should be given.

In determining whether a transaction is contrary to public policy, the courts refer to four sources: domestic statutes, foreign law if relevant by British Columbia choice of law rules, the positive rules of the common law, and the judge's own perception of the legal and moral values of our society. We shall examine each of these sources individually.

B. Statutes

1. Transactions Specifically Prohibited by Statute

Where an enactment specifically prohibits the formation of a contract or other transaction the courts will not permit its direct or indirect enforcement, even though this may cause hardship to one or more parties. Once it is determined on the facts that the transaction is prohibited, the courts will not review the statute to ascertain the policy which prompted its enactment, or to determine whether on the facts that policy is in fact advanced by invalidating the transaction. Courts will not grant relief to parties to a forbidden transaction even though the breach of the statute was trivial and the policy of the statute was not infringed.

Kingshott v. *Brunskill*[1] is an illustration of such a case. The plaintiff, in contravention of the Ontario *Farm Products Grades and Sales Act*,[2] sold ungraded apples to the defendant. It was the intention of both parties that the defendant would grade the apples prior to their resale. The defendant refused to pay for the apples. Roach J.A. of the Ontario Court of Appeal, stated:[3]

> It must be concluded that the main object of the statute and the regulations passed thereunder is the protection of the public. The penalty authorized by the statute is imposed wholly for the protection of the public. Therefore, if the sale here in question was forbidden by the regulations, then it was illegal and notwithstanding that the defendant resold the apples after having graded them and made a profit thereby, the plaintiff cannot recover in an action for the price of those apples.

The learned judge concluded:[4]

> I have looked in vain for any provision in the regulations that would exempt the plaintiff in the circumstances of this case from their application. It is not difficult to conceive of a case in which a farmer who has a small orchard on his farm may have neither the manpower nor the equipment necessary to grade and pack the product of his orchard, in accordance with the regulations. His neighbour, with a much larger orchard and specializing in the growing of fruit, has the necessary help and equipment for the grading and packing of the produce not only of his own orchard but of others in the neighbourhood. It would seem not unreasonable that the first of those two farmers should be permitted to sell his

[1] [1953] O.W.N. 133 (C.A.).
[2] R.S.O. 1950 c. 130.
[3] *Supra*, n. 1 at 135.
[4] *Ibid.* at 135-36.

> whole crop of fruit to the second of those two farmers, who, having the necessary help and equipment, could grade it and pack it in accordance with the regulations before offering it for sale to the public. The regulations, however, do not appear to provide for such a case. There is no provision in the regulations that would exempt the first of those two farmers in that hypothetical case from compliance with the regulations. The Court cannot read into the regulations exemptions which might appear to the Court to be justifiable in a given set of circumstances.

Similar results have occurred in many other cases. For example, courts have refused to enforce contracts for the sale of land forbidden by the *Veterans' Land Act*,[5] or entered into without the consent of authorities required by legislation.[6] Where legislation so stipulates, a contract which is not in a prescribed form is unenforceable.[7] In one case,[8] the plaintiffs disposed of used beekeeping equipment without first obtaining the permission of an "apiculture fieldman" required by the *Alberta Bee Act*. The contract was held to be illegal and unenforceable.

Both Canadian and English texts detail many cases where the courts have refused to enforce contracts prohibited by statute,[9] and as Cartwright J. stated in *Frobisher Limited* v. *Canadian Pipelines and Petroleums Ltd. et al.*:[10]

> Authority is scarcely needed for the proposition that a contract which is expressly . . . prohibited by statute is illegal, and that what is done in contravention of the provisions of an act of the legislature cannot be made the subject matter of an action . . . .

An automatic refusal to hear such cases can and does lead to apparent injustices. A person who confers a benefit under the agreement may be prevented from recovering it. The most technical or trivial breach may result in hardship completely out of proportion to the harm which the legislative prohibition seeks to prevent.

In view of this, the courts will often strive to hold that a contract does not fall within a legislative prohibition. For example, any ambiguity in the contract is resolved in favour of legality. In *Maschinenfabrik Seydelmann K.-G.* v. *Presswood Bros.*,[11] the court considered regulations to the Ontario *Power Commission Act* that prohibited the sale of uninspected and unapproved electrical equipment. The parties to the contract in issue had bought and sold a sausage maker not inspected or approved under the Act. It was held that the contract did not contravene the relevant regulations. The court, noting the "well-settled presumption of law in favour of the legality of a contract,"[12] construed the sale as being conditional upon the requisite approval being obtained.

Similarly, in *Paoli* v. *Vulcan Iron Works Ltd.*,[13] the Supreme Court of Canada upheld a contract to pay an increased salary which could not be put into effect without the permission of a Salaries Controller under the *Wartime Salaries Order*.[14] Rand J. stated:[15]

---

[5] *Frostrup* v. *Elliot*, (1958) 12 D.L.R. (2d) 513 (B.C.S.C.); *Sukovieff* v. *Beliveau et al.*, (1967) 61 D.L.R. (2d) 714 (B.C.S.C.).

[6] *Wirth* v. *Kutarna*, [1955] 5 D.L.R. 785 (Sask. C.A.) (approval required under *The Community Planning Act*, R.S.S. 1953 c. 157.)

[7] *Diversified Crops Ltd.* v. *Patton Farms Ltd.*, (1975) 61 D.L.R. (3d) 749, (Alta. S.C.-T.D.), *aff'd.* (1976) 67 D.L.R. (3d) 190 (Alta. S.C.-A.D.). The *Canada Grain Act* 1970-71-72 (Can.) c. 7 prohibits a licensee from entering into contracts to purchase grain "in any form except in the prescribed form or a form authorized by the Commission."

[8] *Pimvicska* v. *Pimvicska*, [1974] 6 W.W.R. 512, (Alta. S.C.).

[9] *See, e.g.*, *Chitty on Contracts, General Principles* (24th ed. 1977) at 474 *et seq.*, Waddams, *The Law of Contracts* (1977), 351 *et seq.*; Fridman, *The Law of Contract in Canada* (1976), 362 *et seq.*

[10] [1980] S.C.R. 126 at 150. *See also Mira Design Co. Ltd. et al.* v. *Seascape Holdings Ltd.*, [1982] 4 W.W.R. 97 (B.C.S.C.) at 100, 101, *Cyprus Anvil Mining Corp.* v. *White Pass and Yukon Corp. Ltd.*, (1980) 21 B.C.L.R., 93 (B.C.S.C.).

[11] (1965) 53 D.L.R. (2d) 224 (Ont. C.A.).

[12] *Ibid. per* Schroeder J.A. at 229.

[13] [1950] S.C.R. 114, [1950] 1 D.L.R. 593.

[14] P.C. 1549 (75 Can. Gaz. 3535); amended by P.C. 4356 (75 Can. Gaz. 5123).

[15] *Supra*, n. 13 at 594 (D.L.R.)

> It [the contract] was illegal only on the assumption that it was intended to be put into effect and carried out without relation to approval. There is no evidence of this one way or another, and in its absence I assume that these parties intended to comply with the law of the country.

If the statute provides that a contract may be declared void, or if it stipulates that a particular process invalidates a contract, the contract will be enforceable until that declaration is made or process completed.[16]

In many cases involving the breach of either a regulatory statute, or a statute which regulates conduct not in itself morally reprehensible, the plea of illegality has little to do with a *bona fide* desire to advance public policy as determined by the statute in question. Instead, the illegality of the contract is asserted as a fortuitous means of avoiding unwanted obligations.

The rejection of defences of illegality based on the *Lord's Day Act*[17] illustrates the reluctance of courts to assist parties to avoid their otherwise unobjectionable bargains. As Waddams notes:[18]

> Sunday sales have given rise to much trouble; agreements to sell real and personal property have often been held to be void because made on a Sunday contrary to the *Lord's Day Act*. It need hardly be said that the motive in such cases for the vendor's withdrawal from the transaction is less likely to be a sudden surge of piety than a regret that his price was not higher.

In many cases, the courts have avoided the harsh consequences of holding a transaction to be illegal and contrary to the *Lord's Day Act* by finding that the contract was not formed on a Sunday. In *Bergen* v. *Billingham*,[19] for example, the parties agreed to the terms of a sale on a Friday evening. The written accord was not, however, signed until Sunday. The contract was held enforceable because the writing signed on Sunday merely evidenced an agreement made on a juridical day.[20]

Even where the contract falls squarely within a statutory prohibition, some courts have been unwilling to disadvantage an innocent party to the contract. In *Aconley* v. *Willart Holdings Ltd.*,[21] the plaintiffs claimed specific performance of a contract for the sale of land. The defendant pleaded that the agreement was void because it was executed on a Sunday, contrary to the *Lord's Day Act*. The plaintiffs had deposited an engrossed copy of the

---

[16] *Westward Farms Ltd. et al.* v. *Cadieux et al.*, [1981] 3 W.W.R. 673 (Man. Q.B.) at 690 *et seq.* rev'd. on other grounds, [1982] 5 W.W.R. 1 (Man. C.A.).

[17] R.S.C. 1970, c. L-13, s. 4.

[18] *Supra*, n. 9 at 354-355.

[19] (1972) 28 D.L.R. (3d) 99 (Man. Q.B.).

[20] In giving judgment, Wilson J. of the Manitoba Court of Queen's Bench outlined a number of cases where courts had struggled to apply a test of "substantial completion" to determine whether the contract was made on a Sunday. He stated at 102-103:

> Of course, the bargain is void where everything happens on a Sunday: *Ciz* v. *Hauka* (1953), 108 C.C.C. 349, 11 W.W.R. (N.S.) 433, 61 Man. R. 370. The statute does not, however, render illegal a contract created by the acceptance later in the week of an offer tendered the Sunday before: *Bailey* v. *Dawson* (1912), 1 D.L.R. 487, 25 O.L.R. 387; *Gibbons* v. *Koepke*, [1952] 1 D.L.R. 707, 102 C.C.C. 381, 4 W.W.R. (N.S.) 560; or because part of the negotiations occurred on a Sunday: *Young* v. *Taylor*, [1921] 3 W.W.R. 882. The contract is caught by the Act when an offer tendered earlier in the week is accepted on Sunday: *Perry* v. *Anderson* (1970), 12 D.L.R. (3d) 414; or when satisfaction of a condition upon which acceptance is to depend occurs on a Sunday: *Superior Motors Ltd.* v. *Cade (No. 2)*, [1930] 3 D.L.R. 1003, [1930] 2 W.W.R. 448, 24 S.L.R. 558, where although the sale documents were signed on Saturday, the wife's approval of her husband's choice of their new automobile, a condition of the sale, was not given until she actually saw the car the next day. And a contract otherwise void because made on a Sunday may be good because affirmed on another day: *Ollivière* v. *Durand*, [1953] 3 D.L.R. 590, 9 W.W.R. (N.S.) 53, where what occurred on the Sunday was treated as "preliminary" to the actual delivery and acceptance of the goods later in the week.
>
> *Lyle Ltd.* v. *Rouse* (1956), 19 W.W.R. 373, is analogous to the *Cade case*. In the *Rouse* case, the applicable legislation made delivery of a certain document an integral part of the transaction, and where this was done on Sunday, the contract was void. *Contra*, execution of documents not essential to the basic contract will not save the latter when the statute is violated: *Angwinare* v. *McKay* (1960) 25 D.L.R. (2d) 521, where sale of a motor-car was void because done on a Sunday, and not validated by execution of finance papers later in the week, these being merely collateral to the existence of the contract of sale.

But see Serendipity Pools (West) Ltd. v. *Goodman's Industrial Maintenance Ltd.*, (1981) 126 D.L.R. (3d) 140 (Man. C.A.).

[21] (1964) 47 D.L.R. (2d) 146 (Man. Q.B.).

agreement with the defendant's solicitor on a Friday, and were assured that it would be executed on that day. In fact, it was executed by the defendants on a Sunday. Smith J. stated:[22]

> In the case before me the plaintiffs had no reason to suspect that the defendant had completed execution of the contract on Sunday and there was no writing from which such a fact might be inferred. In these circumstances, to permit the defendant to successfully plead this defence would constitute a miscarriage of justice.

We examine later other cases involving innocent parties to an illegal contract. It is important to note here, however, that the courts are willing to employ creative statutory interpretation to temper the harsh results which might flow to an innocent party from the application of the general rule.[23]

Not all statutes merely forbid the formation of a specific contract. A number of federal and provincial statutes stipulate expressly that contracts are illegal or otherwise void or unenforceable. A computer-assisted search confirms that no standard legislative formula is employed in either federal or provincial statutes to designate a contract which contravenes the policy of a statute. Some statutes use the words "void," "illegal" or "unenforceable," either alone or in combination. On occasion, these words are modified by adjectives ("absolutely void"), or found joined with other words which reinforce the idea of a contract being void ("null and void," "void and of no effect," "unlawful and void"). Other statutes prohibit the courts from entertaining actions based on a particular contract.

The results of the computer survey may be found in Appendix A, in which we have grouped the retrievals according to the formula of words used to invalidate a contract. The extent to which the use of any particular formula limits the jurisdiction of a court to grant relief from the consequences of statutory illegality raises interesting questions of statutory construction, which we shall examine in more detail in Chapter VI. It is sufficient to note here that while courts feel constrained not to question the wisdom of expressly invalidating a contract in a particular case, the use of some of the statutory formulae may permit the court to adopt a flexible attitude to the question of whether the general rule applies in full vigour to a contract "invalidated" by statute.[24]

2. Transactions Contravening the Policy of a Statute

Even when the formation of a contract or other transaction is not expressly prohibited by a statute, the transaction may run counter to the policy and purpose of the statute. The courts have attempted to give effect to the policy underlying a statute by refusing to enforce transactions which, if performed, would tend to bring about the very result the statute was intended to prevent. Once again, courts are not concerned with the merits of the policy which the statute seeks to advance. The issue is not whether the result contemplated by the statute is in the public interest. That is taken as given. The only issue is whether giving full effect to the statute requires the court to

---

[22] *Ibid.* at 151.

[23] *See, e.g. Velensky* v. *Hache*, (1981) 121 D.L.R. (3d) 747 (N.B.Q.B.) in which it was held that New Brunswick gaming acts did not avoid the underlying debt where money is advanced knowingly to facilitate gambling. In *Central Trust Co.* v. *Rafuse*, (1983) 147 D.L.R. (3d) 260 (N.S.S.C.-A.D.) it was suggested by Cooper, J.A. at 262 that even if a contract was itself illegal, a party to it may nevertheless be liable on the basis of "warranty or a collateral contract arising out of the dealings between the parties." No authority was cited for this proposition.

[24] *See, for example, MacLeod* v. *Canada Permanent Trust Co., et al.*, (1980) 110 D.L.R. (3d) 737 (N.S.S.C.-A.D.). In *Nike Infomatic Systems Ltd.* v. *Avac Systems Ltd.*, (1979) 16 B.C.L.R. 139 (B.C.S.C.), Locke J. noted that the question of the effect of invalidating words on a contract was one to be answered on the facts and on the wording of the statute, having due regard to its object.

deem a transaction illegal. In *Prince Albert Properties and Land Sales Ltd.* v. *Kushneryk*, Culliton J.A. stated:[25]

> Where the contract itself is expressly prohibited by statute no difficulty arises. . . . [S]uch [a] contract is void no matter the purpose or object of the legislation. The difficulty arises when the prohibition is by implication and such implication arises most frequently in a statute, such as the one under consideration, which imposes a penalty on a person who acts in violation of its provisions. The material factor then to consider is whether the sole purpose of the penalty may be taken to be the protection or increase of the revenue or whether it is also designed for the protection of the public . . . .

Regulations requiring the licensing of businesses often fail to stipulate the effect of a contract to which an unlicensed businessman is a party. In *Kocotis* v. *D'Angelo*,[26] the plaintiff contracted to do certain electrical work for the defendant. He performed the work required by the contract. He had neglected, however, to acquire the Class "A" licence required by Ottawa city bylaws. The plaintiff's suit for the balance owing under the contract was unsuccessful on the ground that the contract was illegal.[27]

Courts will also decline to give effect to transactions whose aim is to evade prohibitions contained in a statute. In *Williams* v. *Fleetwood Holdings Ltd.*,[28] the court refused to permit the plaintiff to foreclose on a mortgage granted as part of a sham loan transaction. The parties' object in so structuring their contract was to avoid Ontario securities legislation limiting the plaintiff's commission on the sale of shares to a maximum of 20% of the price.

An agreement made to assist a person to contravene a statute will also be characterized as illegal. In a number of cases, the courts have dealt with arrangements between management companies and individual members of a profession. In *Carruthers Clinic Ltd.* v. *Herdman*,[29] the plaintiff company ran a medical clinic. Ontario legislation prohibited unregistered persons from practising medicine. The plaintiff company brought an action to enforce a restrictive covenant against a doctor who had left its employ. McLennan J. of the Ontario High Court, stated the principle succinctly:[30]

> If it is unlawful for the plaintiff to practise medicine then an agreement made to assist in carrying out that purpose is unlawful and void.

---

[25] [1955] 5 D.L.R. 458, 16 W.W.R. 567 (Sask. C.A.) at 465 (D.L.R.). *See also Montreal Trust Co.* v. *Abitibi Power & Paper Co.*, [1937] 4 D.L.R. 369 *per* Kingstone J. at 373:

> . . . where a penalty is imposed by Act of Parliament upon any transaction, the transaction will be illegal, though it is not expressly prohibited by the Act, and it is not necessary that the Act should declare that a contract . . . is void.

[26] (1957) 13 D.L.R. (2d) 69 (Ont. C.A.), followed in *Calax Construction Inc.* v. *Lepofsky*, (1974) 50 D.L.R. (3d) 69 (Ont. H.C.). This case was distinguished in *Day and Night Heating Ltd.* v. *Brevick*, (1961) 38 W.W.R. 493, 35 D.L.R. (2d) 436 (B.C. Co. Ct.), on the ground that the Surrey bylaw in question did not, on a strict construction, have the effect of invalidating any contract entered into by an unlicensed businessman. *See also Rosemay* v. *Nuberg & Dcle Construction Ltd.*, (1983) 40 O.R. (2d) 152 (Ont. H.C.); *Metledge* v. *Ryan*, (1980) 113 D.L.R. (3d) 248 (N.S.S.C.A.D.) (compromise of illegal claim unenforceable); *Lasenby* v. *Lump Holdings & Developments Ltd. et al.*, (1980) 117 D.L.R. (3d) 181 (Ont. H.C.).

[27] *Ibid.* at 75. Laidlaw J.A. of the Ontario Court of Appeal stated at 75:

> The argument that the making of the contract entered into by the respondent was not prohibited, expressly or impliedly, by statute, but only by the provisions in a by-law enacted by the Board of Commissioners of Police for the City of Ottawa and, therefore, is not illegal, cannot be given effect. In either case, any person who is within the scope of the statute or of the by-law, and acts in disobedience to it by entering into a forbidden contract, cannot have the aid of the Court to enforce such a contract.

[28] (1973) 41 D.L.R. (3d) 636 (Sask. C.A.).

[29] (1956) 5 D.L.R. (2d) 492 (Ont. H.C.). *See also Kirsten Holdings Ltd.* v. *Louie*, unreported S.C.B.C. No. C792111, May 16th, 1980, *per* Callaghan J.:

> But from a consideration of the *Dentistry Act* as a whole it is clear that the Act goes further than the regulation and control of the practice of dentistry. It prohibits any person, including a corporation, from practising dentistry unless authorized pursuant to the Act. The practice of dentistry by unauthorized persons is prohibited. The prohibition imposed by Section 70 of the *Dentistry Act* " . . . no corporation shall carry on the practice of dentistry" could not be clearer. Since a corporation can only practise dentistry through individuals this section implicitly renders contracts between a corporation and an individual for the purpose of the practise of dentistry illegal. Accordingly it follows that since the purpose of the Act is to prevent unauthorized persons from practising dentistry, enforcement of the agreement in the case at bar would be directly contrary to the intent of the Act. In the result the plaintiff's claim for breach of the agreement must be dismissed.

[30] *Ibid.* at 502.

In the past, courts were not slow to conclude that upholding the purpose of a statute required them to decline to enforce a contract.[31] However, in recent years, courts have been more reluctant to find that the policy of a statute required the voiding of a contract.[32] This trend culminated in the English case of *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[33] In that case, shippers of grain withheld the balance due on a contract for the carriage of grain on the ground that the plaintiff had overloaded the ship, contrary to the English *Merchant Shipping (Safety and Loadline Conventions) Act* of 1932.

Devlin J. was reluctant to characterize the contract in issue as one which the Act impliedly prohibited, and preferred to adopt a restrictive approach. He felt that the main issue was whether the statute is designed to protect the public. In judging whether furthering the policy underlying a statute requires the court to avoid a contract, Devlin J. held:[34]

> A court should not hold that any contract or class of contracts is prohibited by statute unless there is a clear implication, or "necessary inference," as Parke B. put it, that the statute so intended. If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another, which may easily be broken without wicked intent. Persons who deliberately set out to break the law cannot expect to be aided in a court of justice, but it is a different matter when the law is unwittingly broken. To nullify a bargain in such circumstances frequently means that in a case—perhaps of such triviality that no authority would have felt it worthwhile to prosecute—a seller, because he cannot enforce his civil rights, may forfeit a sum vastly in excess of any penalty that a criminal court would impose; and the sum forfeited will not go into the public purse but into the pockets of someone who is lucky enough to pick up the windfall or astute enough to have contrived to get it.

Devlin J.'s judgment has been criticized by E. K. Teh in a recent article.[35] Teh maintains that Devlin, J. misconstrued the issue. The question was not whether the statute impliedly prohibited a certain contract, but rather whether furthering the purposes of the statute required the court to deny relief. Nevertheless, it is clear from the context of his judgment that the latter question was in fact the one Devlin J. addressed, even though his judgment is not as clear as it might be on that point. In *Archbolds (Freightage) Ltd.* v. *Spanglett Ltd.*,[36] Devlin J. clarified the concerns he raised in the *St. John Shipping* case:[37]

> The general considerations which arise on this question were examined at length in *St. John Shipping Corporation* v. *Joseph Rank Ltd.*, and Pearce L.J. has set them out so clearly in his judgment in this case that I need add little to them. Fundamentally they are the same as those that arise on the construction of every statute; one must have regard to the language used and to the scope and purpose of the statute. I think that the purpose of this statute is sufficiently served by the penalties prescribed for the offender; the avoidance of the contract would cause

---

[31] Waddams, *supra*, n. 9 at 503. *See, e.g., Bensley* v. *Bignold*, (1822) 5 B. & Ald. 335, 106 E.R. 1214, where Bayley J. stated at 340-341; 1216:

> Where a provision is enacted for public purposes, I think that it makes no difference whether the thing be prohibited absolutely or only under a penalty. The public have an interest that the thing shall not be done, and the objection in this case must prevail, not for the sake of the defendant, but for that of the public.

[32] *Craies on Statute Law*, (7th Ed. 1971) at 252 *et seq.*

[33] [1957] 1 Q.B. 267.

[34] *Ibid.* at 288.

[35] *Bringing Assumpsit on Illegal Contracts*, (1972) 4 Univ.of Tas. L. Rev. 219 at 231 *et seq.* The same criticism is levelled at Devlin J.'s judgment by C. Grunfeld in a case comment: (1957) 20 Mod. L. Rev. 172.

[36] [1961] Q.B. 374, [1961] 1 All E.R. 417.

[37] *Ibid.* at 390 (Q.B.).

> grave inconvenience and injury to innocent members of the public without furthering the object of the statute. Moreover, the value of the relief given to the wrongdoer if he could escape what would otherwise have been his legal obligation might, as it would in this case, greatly outweigh the punishment that could be imposed upon him, and thus undo the penal effect of the statute.

The question put by Pearce L.J. was:[38]

> Did the statute thereby intend to forbid by implication all contracts whose performance must on all the facts (whether known or not) result in a contravention of that section?

We have noted that Canadian courts are sometimes reluctant to classify a contract as "illegal," even if on its face it falls squarely within a statutory prohibition. Canadian courts are equally reluctant to apply the general rule to contracts impliedly contrary to statute. Devlin J.'s judgment in the *St. John Shipping* case has been favourably received and applied in Canada.[39]

Although Devlin J.'s test vests a great deal of discretion in the court, there is very little guidance in the cases or in academic writing concerning the factors which should be taken into account in exercising that discretion. It is clear that the relative importance of any particular factor must vary depending on the nature of the case. For example, in the *Carruthers Clinic* case, the protection of the public was uppermost in the judge's mind. A recent article canvasses a number of factors with which a court will be concerned in carrying out this task.[40] The author concluded:[41]

> By way of summary, a contract which violates or appears inconsistent with a statute should not be immediately classified as illegal *per se*. Rather, a court required to analyze a defence relying on such a statute should determine whether relief will contravene legislative intent. In two situations it may be conclusively presumed that any relief will do so: when the contract itself has been expressly prohibited and when the *act* prohibited is a crime *malum in se*. Otherwise, consideration of such factors as statutory imposition of penalty, requirement of license, legislative history, and most importantly, statutory purpose, should indicate whether relief will undermine the violated statute. If relief will not render the statute ineffective, it should be granted without declaring the contract illegal.

C. Transactions Illegal Under Foreign Law

1. Contracts

The vast majority of cases in which foreign laws are relevant involve contracts. We shall therefore address at first instance the rules of private international law governing the substantive validity of contracts, after which we shall briefly discuss the position of parties to other transactions.

In most cases involving illegal contracts, a court will be concerned with illegality by the *lex fori*. In British Columbia, the *lex fori* would be either a British Columbia or federal statute, or a rule of common law or equity. However, the parties may, perhaps inadvertently, be in breach of a foreign law relevant by British Columbia choice of law rules.

---

[38] *Ibid.* at 385 (Q.B.). *See also* S. Cretney, *Illegality and its Consequences* (1970) 120 N.L.J. 1093.

[39] *See, e.g., Sidmay Ltd.* v. *Wehttam Investments*, [1967] 1 O.R. 508, 61 D.L.R. (2d) 358 (Ont. C.A.); *Carruthers Clinic Ltd.* v. *Herdman*, *supra*, n. 29. *Lunenberg County Press Ltd.* v. *Demone*, (1978) 40 A.P.R. 179 (N.S.S.C.-A.D.); *Re City of Stratford and Canadian Union of Public Employees*, (1980) 28 O.R. (2d) 734 (Ont. Div. Ct.); *Lasenby* v. *Lamp Holdings & Developments Ltd. et al.*, (1981) 29 O.R.(2d) 794, (1980) 117 D.L.R. (3d) 181 (Ont. Div. Ct.). *Canada Permanent Trust Co.* v. *MacLeod*, (1979) 103 D.L.R. (3d), 444 (N.S.S.C.-T.D.), *aff'd.* 110 D.L.R. (3d) 737 (N.S.S.C.-A.D.), *First City Trust Co.* v. *Landcraft Projects Inc. et al.*, unreported B.C.S.C. No. H82/1885, H82/1201 *per* Callaghan L.J.S.C.; [1983] B.C.D. (Civ.) 2767-03. The High Court of Australia has also approved Devlin J.'s judgment: *see Yango Pastoral Co. Pty. Ltd.* v. *First Chicago Australia Ltd. et al.*, (1978) 139 C.L.R. 410 (H. Ct. Aus.).

[40] Suzanne Smith, *Contracts in Violation of Statutes—Necessarily Illegal?* [1976] 5 U.C.L.A.-Alaska L. Rev. 381, at 388 *et seq.*

[41] *Ibid.* at 405.

It is well established that for most purposes, contracts are governed by their "proper law." The term "proper law of the contract" has been defined as follows:[42]

> . . . the term "proper law of a contract" means the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection.

A foreign law may also be relevant when a contract calls for performance in a foreign jurisdiction not indicated by the proper law rule. The law of the jurisdiction where the contract is to be performed is known as the *lex loci solutionis*.

Three possible conflicts of law may arise. The transaction may be legal by its proper law and illegal by British Columbia law. Alternatively, the contract may be legal by British Columbia law, but illegal by its proper law. The contract may also stipulate that the contract is to be performed in a jurisdiction whose law, unlike the *lex fori* or the proper law, forbids the stipulated act.

(a) Illegality by the Law of the Forum

A contract illegal by the law of the jurisdiction in which the case is being heard may be legal under the proper law of the contract. In such a case the court will not enforce the contract if it is contrary to the public policy of the forum,[43] by which, as the British Columbia Court of Appeal has recently held,[44] is meant a contract contrary to an "essential public or moral interest" or "contrary to [the forum's] conception of essential justice and morality."[45]

There exist numerous cases in which courts have refused to enforce a contract lawful under the proper law of the contract, but contrary to the public policy of the *lex fori*.[46] This response to contracts with foreign elements is an example of a general rule of Private International Law whereby courts may refuse to give effect to any foreign law contrary to the public policy of the forum.[47]

(b) Illegality by the Proper Law

If a contract is illegal by its proper law it will not be enforced in British Columbia.[48]

In *Etler* v. *Kertesz*,[49] a decision of the Ontario Court of Appeal, the plaintiff lent the defendant a sum of U.S. currency, to be repaid in Switzerland at a later date. Under its Austrian proper law, the contract was illegal and void,

---

[42] Dicey and Morris, *The Conflict of Laws* (9th ed. 1973) Rule 146 at 721. *See also* A. Thomson, *A Different Approach to Choice of Law in Contract*, (1980) 43 Mod. L. Rev. 650.

[43] *Block Bros. Realty Ltd.* v. *Mollard*, (1981) 122 D.L.R. (3d) 323 (B.C.C.A.); *see also National Surety Co.* v. *Larsen*, [1929] 3 W.W.R. 299, (B.C.C.A.); *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.*, [1939] A.C. 277, [1939] 1 All E.R. 513, [1939] 2 D.L.R. 1 (P.C.); *Harold Meyers Travel Service Ltd.* v. *Magid*, (1975) 9 O.R. (2d) 200 (Ont. H.C.), *Bank of Montreal* v. *Snoxell*, (1982) 143 D.L.R. (3d) 349 (Alta. Q.B.).

[44] *Block Bros. Realty Ltd.* v. *Mollard*, *ibid.*

[45] *Ibid.* at 330.

[46] *See* Dicey & Morris, *supra*, n. 42 at 149 *et seq.*

[47] *See* Castel, Canadian Conflict of Laws (1975), Volume I, at 95 *et seq.*

[48] In *Kahler* v. *Midland Bank Ltd.*, [1950] A.C. 24 (H.L.), Lord Simonds said at 27:

> What then would the position be if, on behalf not of the Bohemian Bank but of the Zivnostenska Bank, the Midland Bank had pleaded that the appellant was not entitled to immediate possession because their bailors were entitled to refuse delivery? This would depend, I think, on one thing only, viz., what is the proper law of the contract between the parties. If the proper law is the law of Czechoslovakia, I have no doubt that the defence is a valid one; for the courts of this country will not compel the performance of a contract if by its proper law performance is illegal.

See also Zivnostenska Banka National Corporation v. *Frankman*, [1950] A.C. 57 (H.L.).

[49] (1960) 26 D.L.R. (2d) 209, [1960] O.R. 672. In this case the court rejected the argument that Swiss law, (the *lex loci solutionis*) under which the payment was legal, should be applied as the proper law on the ground that the parties should be taken to intend to apply a law under which the transaction would be legal: *see* D.A. McConville, *Illegality and the Consideration In Favorem Contractus* (1962) 11 I.C.L.Q. 855.

being in breach of Austrian exchange control legislation. Porter C.J.O. held, *per curia*:[50]

> . . . here the parties were both personally present in Austria, entered into the contract there, and performed a substantial part of the contract there. I am of the opinion that upon these facts, the system of law "with which the transaction has its closest and most real connection" is the law of Austria. And I should further add that the law of Austria relating to foreign exchange, under which the transaction without the required consent would be illegal, is not in my opinion, a law of such a penal or confiscatory nature that it should be disregarded by the Courts of this country. This law is similar in its effect to the law in force in Canada in 1947, prohibiting dealings in foreign exchange except through certain authorized dealers . . .
>
> Since by the law of Austria the contract was invalid, void, and, being prohibited by positive law, illegal and the promise to repay was thus for an illegal consideration, the plaintiff is not entitled to recover upon the contract.

(c) Illegality by the Law of the Place of Performance

It is possible that the law of the place where the contract is to be performed might render its performance illegal. This situation will arise where the law of the place of performance is different from the proper law and the law of the forum. If the law is the same as either of the latter two laws, then the contract may be unenforceable as contrary either to the proper law or to the public policy of British Columbia.

A contract will not be enforced if it is illegal under the law of the place where it is to be performed. In *Ralli Bros.* v. *Compania Naviera Sota y Aznar*,[51] both the law of the forum and proper law were English. The contract in issue stipulated for the payment in Spain of chartered freight in excess of the maximum permitted by Spanish law. Scrutton L.J. held:[52]

> I should prefer to state the ground of my decision more broadly and to rest it on the ground that where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. This country should not in my opinion assist or sanction the breach of the laws of other independent States.

The rule as formulated by Scrutton L.J. is not a choice of law rule. Rather it is stated as a positive rule of English law.[53]

It may be argued that the House of Lords has extended the principle set out in the *Ralli Bros.* case to a contract which violated a foreign law *not* relevant by English choice of law rules. In *Regazzoni* v. *K.C. Sethia (1944) Ltd.*,[54] the Swiss plaintiff contracted in Germany to buy jute bags manufactured in India from the defendant "c.i.f. Genoa." The bags were to be transshipped to South Africa, in breach of Indian law. The defendant, an English company, failed to deliver the bags. An action was commenced in England, and the defendant successfully pleaded that the contract was illegal. The House of Lords so held notwithstanding that Indian law was not relevant by English choice of law rules. The parties knew that Indian law would be broken by the shipment to South Africa and the "wicked intention" to

---

[50] *Ibid.* at 223.

[51] [1920] 2 K.B. 287 (C.A.).

[52] *Ibid.* at 304.

[53] *See also Foster* v. *Driscoll*, [1929] 1 K.B. 470 (C.A.) at 510, *per* Lawrence L.J.:

> On principle . . . I am clearly of opinion that a partnership formed for the main purpose of deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal, even though the parties have not succeeded in carrying out their enterprise, and no such criminal offence has in fact been committed; and none the less so because the parties may have contemplated that if they could not successfully arrange to commit the offence themselves they would instigate or aid and abet some other person to commit it.

The parties had contracted to export liquor to Canada for re-export to the United States during the Prohibition era.

[54] [1958] A.C. 301 (H.L.)

circumvent Indian law was sufficient to put them out of court.[55] In *Regazzoni* there was some connection between the contract and the foreign law allegedly broken. The goods were manufactured in India. It is not clear, however, how close a connection with a foreign law not relevant by British Columbia choice of law rules there must be to attract this principle.

Indeed, it is not clear that any connection at all is necessary. The results could be startling if the *Regazzoni* case were pushed to its limits. For example, would it require that a British Columbia court decline to enforce a sale of Egyptian cotton to a Jewish businessman when the plaintiff, defendant and goods are all in British Columbia, if Egyptian law forbade the sale of Egyptian goods to Jews?[56]

(d) Evasion of Inconvenient Laws

The recent decision of Locke J. in *Nike Infomatic Systems Ltd.* v. *Avac Systems Ltd.*[57] raises an issue of some importance. Can the parties to a contract avoid the mandatory rules of one jurisdiction merely by choosing as the "proper law" of the contract the law of another jurisdiction which has no similar constraints? This issue may arise in two contexts. If the parties wish to avoid a rule of the law of the forum whose courts are most likely to preside over litigation involving the contract, the issue, as we have noted, is whether or not the result under the chosen law would be contrary to the public policy of the forum. Alternatively, the parties may seek to avoid provisions of the objectively determined proper law (which may very well be different than the probable *lex fori*). For example, a contract may be most closely connected with Alberta, but the parties choose British Columbia law to govern the contract. This was the case in *Nike Infomatic*, where the parties successfully avoided the *Alberta Franchises Act*,[58] which required the plaintiff to register and to file a prospectus prior to selling franchises, by choosing British Columbia law to govern their contract.

The leading case on this point is the judgment of the Privy Council in *Vita Food Products Inc.* v. *Unus Shipping Co.*[59] In that case, Lord Wright affirmed that, subject to the qualification that the choice must be *bona fide*, parties may choose any law to govern their contract. Lord Wright stated:[60]

> But where the English rule that intention is the test applies and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy. In the present case however it might be said that the choice of English law is not valid for two reasons. It might be said that the transaction which is one relating to the carriage on a Nova Scotian ship of goods from Newfoundland to New York between residents in these countries contains

---

[55] *See Illegality and the Conflict of Laws* (1958) 108 L.J. 7.

[56] The example is that given by F.A. Mann in *Illegality in the Conflict of Laws* (1956) 19 Mod. L. Rev. 523 at 525. This article is highly critical of the Court of Appeal decision in *Regazzoni*. It is a curious consequence of *Regazzoni* that English courts are more solicitous of foreign than English sensibilities: *cf. Holman* v. *Johnson*, 1 Cowp. 341; 98 E.R. 1120 (1775) where, in respect of a sale of tea situate at Dunkirk which, to the knowledge of both parties, was to be smuggled into England, Lord Mansfield held, at 344-5, 1121-2:

> This is an action brought merely for goods sold and delivered at Dunkirk. Where then, or in what respect is the plaintiff guilty of any crime? Is there any law of England transgressed by a person making a complete sale of a parcel of goods at Dunkirk, and giving credit for them? The contract is complete, and nothing is left to be done. The seller, indeed, knows what the buyer is going to do with the goods, but has no concern in the transaction itself . . .
>
> If the defendant had bespoke the tea at Dunkirk to be sent to England at a certain price; and the plaintiff had undertaken to send it into England, or had had any concern in the running it into England, he would have been an offender against the laws of this country. But upon the facts of the case, from the first to the last, he clearly has offended against no law of England.

[57] [1980] 1 W.W.R. 528 (B.C.S.C.).

[58] S.A. 1971, c. 38, (am. 1972 c. 42, s. 3, 4).

[59] *Supra*, n. 43.

[60] *Ibid.* at 8 (D.L.R.).

> nothing to connect it in any way with English law, and therefore that choice could not be seriously taken. Their Lordships reject this argument both on grounds of principle and on the facts. Connection with English law is not as a matter of principle essential.

In the *Nike Infomatic* case Locke J. held that the choice was *bona fide* even though the effect was to evade the Alberta *Franchises Act*:[61]

> In the case at bar, the existence of the British Columbia plaintiff makes the connection with British Columbia a real one and the grounds (even if needed) stronger than in *Vita Foods*. I do not accept the first argument. As to the qualification, I see nothing in it unless it could be advanced to indicate that the choice of law was not *bona fide* but only an attempt to evade Alberta law. I think the phraseology and use of the word "therein" in the second sentence shows the complete reverse.

It would appear that Canadian courts have adopted a "real connection" test coupled with a requirement that the parties must not have had as their sole end the evasion of the objectively determined proper law. In *Greenshields Inc.* v. *Johnston*[62] this test was applied by Medhurst J. of the Alberta Court of Queen's Bench. The plaintiff claimed on a guarantee void under the Alberta *Guarantees Acknowledgment Act*. Nevertheless, the claim succeeded, as the parties had chosen Ontario law, there was a real connection with Ontario and there was no intent to avoid Alberta law. Medhurst J. concluded that avoiding the effect of the *Act* did not violate any fundamental policy of Alberta law.[63]

In the result, it would appear that a contract will not be deemed "illegal" merely because it fails to conform to a mandatory rule of the objectively determined proper law, provided the parties have made a *bona fide* choice of another law with no similar requirements. Canadian courts appear to require more in the way of a "real connection" than English courts, although it is still too early to tell how rigid the courts will be in determining whether or not the law chosen has a "real connection" with the contract.

2. Other Transactions

It is impossible to generalize respecting the possible applicability of foreign laws to non-contractual transactions. The applicable British Columbia choice of law rule will vary according to the peculiar nature of the transaction. Moreover the nature of the transaction in issue may be such that questions may be raised concerning not only the appropriate law to apply to the transaction, but also whether reference to domestic or foreign law is appropriate to determine how the transaction is to be characterized for the purpose of applying choice of law rules. For example, at common law a promise to pay money unsupported by consideration may be characterized as a gift, while the same transaction in a civilian jurisdiction would be regarded as a matter of contract. It is sufficient for the purposes of this Report merely to underline by a few examples that within the classifications recognized by British Columbia law, there exist choice of law rules which are different than those which apply to contracts.

For example, the essential validity of an *inter vivos* trust is generally governed by the law of the place in which the trust *corpus* is situated. If the *corpus* is situated in more than one jurisdiction, then it has been suggested that

---

[61] *Supra*, n. 57 at 534.

[62] [1981] 3 W.W.R. 313 (Alta. Q.B.). A judgment obtained under an express contractual choice of British Columbia as the forum for the dispute, and a choice of its law, is registrable under the Alberta *Reciprocal Enforcement of Judgments Act* (R.S.A. 1980, c. R-6) even though the party to be charged resides in Alberta and Alberta law required notarial acknowledgment. *See Bank of Montreal* v. *Sacuvil*, *supra*, n. 43.

[63] In contrast, in *Golden Acres Ltd.* v. *Queensland Estates Pty.*, [1969] Q.L.R. 378 (S.C.), an Australian court held that the choice of Hong Kong law to govern an agency contract for the sale of Queensland land was not a *bona fide* choice of law, and hence the agreement was subject to Queensland licensing regulations. *See also Queensland Estates Pty.* v. *Collas*, [1971] Qd. L.R. 75, and A. Thomson, *A Different Approach to Choice of Law in Contract*, *supra*, n. 42 at 658–662.

the "proper law" of the trust should apply.[64] If the trust is testamentary and concerns movables, the general rule favours the law of the testator's domicile at death.[65] If the trust is a remedial trust, its formation and validity probably depend upon the "proper law of the obligation," which may be, for example, the proper law of the contract, the *lex situs*, or the law of the jurisdiction in which an unjust enrichment occurs.[66] The question of title to property passed by a gift, and the obligations of the donor to the donee, may be governed by the *lex situs* in the case of immovables, and tangible movables, and by the "proper law of the transfer" in the case of a "casual *situs*."[67]

It would appear that the illegal nature of a non-contractual transaction would, by analogy with the law governing contracts, be determined by the law of that jurisdiction indicated by British Columbia choice of law rules. If such cases arise, it is likely that a British Columbia court will judge the legality of the transaction by the applicable foreign law, subject to any overriding concerns of British Columbia public policy.

D. Transactions Contravening the Policy of the Common Law

Public policy is not expressed solely in statutes which directly or indirectly prohibit certain forms of conduct. In a number of cases courts have defined public policy by reference to a "policy of the law" synthesized from common law cases, and have refused to enforce transactions which infringe the policy so defined.

Cases involving common law illegality differ in one important respect from cases involving statutory illegality. Waddams distinguishes between them as follows:[68]

> A distinction must be drawn between cases where the court interferes with an agreement as contrary to public policy—the cases of so-called common law illegality—and the cases where the court strikes down an agreement as directly contrary to statute—statutory illegality. In the former group of cases the court may of course take account of statutes, for the public policy of a society is reflected in its statutes, but the reason for striking down the agreement is the court's apprehension of what public policy is. The court itself makes the judgment as to what is public policy and the court itself must strike the necessary balance. In the case of an agreement that is contrary to a statute, though of course public policy remains the root reason for intervention, the court does not itself make the judgment of what is public policy. If the legislature has enacted that no one shall sell ungraded apples the court is precluded from discussing the question of whether or not an agreement to sell ungraded apples is or is not contrary to "public policy."

Two important consequences flow from the role of the court in determining public policy. First, the determination must be made after the contract has been formed or transaction entered into. As a result, where a new head of public policy is created or an old one extended, the parties may not discover that their agreement is unenforceable until after the contract has been partly or wholly executed. Second, public policy may change. Cases may be overruled or common perceptions of society may alter. Uncertainty is the inevitable result.[69]

It is possible to categorize decisions characterizing various transactions as illegal. Unfortunately there is no unanimity among academic writers as to

---

[64] Castel, Canadian Conflict of Laws, Vol. 11 at 482 *et seq.*

[65] Dicey & Morris, The Conflict of Laws, 9th ed. at 651.

[66] *Ibid.* at 924 (Rule 176).

[67] *Ibid.* at 537–539 (Rule 81).

[68] *Supra*, n. 9 at 343-4.

[69] *See* in particular comments by Waddams, *ibid.* at 345.

the proper categories.[70] We are of the view that nothing would be gained from our entering into the controversy relating to categorization. For the purposes of this Report, it is sufficient merely to give a few examples of transactions contrary to the policy of the common law. While we recognize that the concept of public policy is of sufficiently broad import that many further examples may be found in the cases, an attempt to compile an exhaustive list would neither advance nor hinder the case for reform.

A number of established heads of public policy can be isolated. At common law, contracts which involve the commission of crimes or torts are obvious examples of illegal arrangements.[71] Courts have been vigilant in protecting the integrity of the judicial process: agreements not to appear at the public examination of a bankrupt,[72] to pay a witness more than a statutory fee,[73] to maintain a spouse in return for a collusive divorce,[74] to stifle a prosecution[75] or not to appear as a witness[76] have all been held illegal. Contracts which involve undue interference with proper executive, judicial or administrative governmental functions are also "illegal",[77] including contracts which involve trading in public offices,[78] bribery, or even the fettering of legislative freedom.[79]

The courts have gone beyond public morality to regulate contracts which might offend private morality. Contracts involving "sexual misconduct" have been held illegal even where no criminal activity is involved. For example, a contract made in consideration of extra-marital co-habitation has been held illegal.[80] Courts will also refuse relief in respect of agreements to marry if entered into by a person already married.[81]

Any multiplication of examples would only serve the purpose of illustrating the broad range of public policies which a contract may infringe. Our research has led us to conclude that, in general, courts have taken an expansive view in defining and applying public policy. The policies which courts seek to uphold cover the whole spectrum of human activity. Furthermore, in determining the nature and extent of public policy, courts may reason deductively or inductively. They may survey a number of cases and deduce from them a governing public policy. Conversely, a court may create a new head of public policy with reference to current issues of public concern, either on the basis of evidence led before it, or on the basis of facts so notorious as to be proper matters of which judicial notice can be taken.

---

[70] Waddams, *ibid.* at 345 notes that one writer has nine categories, another 23.

[71] *See* cases cited by Waddams, *ibid.* at 346. *See also Wanderers' Hockey Club* v. *Johnson*, (1913) 14 D.L.R. 42 (B.C.S.C.) (inducing breach of contract), *Apthorp* v. *Neville & Co.*, (1907) 23 T.L.R. 575 (defamation), *Thompson* v. *Bitensch*, [1980] 6 W.W.R. 143 (Sask. C.A.) (use of contract to deceive lending institution), *Lasell* v. *Thistle Gold Co. Ltd., (N.P.L.)*, (1905) 11 B.C.R. 466, *aff'd.* (1906) 37 S.C.R. 324.

[72] *Kearley* v. *Thomson*, (1890) 24 Q.B.D. 742 (C.A.).

[73] *Hendry* v. *Zimmerman*, [1947] 2 W.W.R. 358, [1947] 4 D.L.R. 550, *aff'd.* [1948] 1 W.W.R. 385, 56 Man. R. 22, [1948] 2 D.L.R. 287 (Man. C.A.), *Symington* v. *Reifel*, (1930) 43 B.C.R. 172, *aff'd.* (1931) 43 B.C.R. 388, [1931] 1 D.L.R. 935, [1931] 1 W.W.R. 410 (B.C.C.A.).

[74] *Campbell* v. *Campbell*, [1936] 4 D.L.R. 52, (N.S.S.C.).

[75] *Johnson* v. *Musselman*, [1917] 2 W.W.R. 444, 28 C.C.C. 165, 37 D.L.R. 162 (Alta. S.C.-A.D.); *Major* v. *McCraney*, (1897) 5 B.C.R. 571, *aff'd.* (1898) 29 S.C.R. 182; *but cf. Re Teamsters Local Union No. 213 and Gulf Canada Ltd.*, (1980) 53 C.C.C. (2d) 310 (B.C.S.C.).

[76] *Flexi-Coil Ltd.* v. *Smith-Roles Ltd. et al.*, [1981] 1 F.C. 632 (F.C.C.-T.D.).

[77] *Clements* v. *Coughlan*, (1924) 34 B.C.R. 401 (B.C.S.C.) (M.P. could not recover commission due for arranging contract with the government).

[78] *Carr-Harris* v. *Canadian General Electric Co.*, (1921) 61 D.L.R. 434 (Ont. S.C.-A.D.).

[79] *Vancouver* v. *Registrar of Vancouver Land Registration District*, 15 W.W.R. 351, [1955] 2 D.L.R. 709 (B.C.C.A.) *Finney* v. *Township of McKellar*, (1982) 133 D.L.R. (3d) 351 (Ont. C.A.).

[80] *Prokup* v. *Kohut*, (1965) 54 D.L.R. (2d) 717 (B.C.S.C.).

[81] *Spiers* v. *Hunt*, [1908] 1 K.B. 720, *Wilson* v. *Carnley*, [1908] 1 K.B. 729 (C.A.).

CHAPTER IV

DOES THE TRANSACTION INFRINGE PUBLIC POLICY?

A. General[1]

Once a court has concluded that a transaction has the potential to infringe public policy, contravene a statute or bring about a result which a statute seeks to avoid, it must then turn to the question whether in fact the transaction does violate the statute or otherwise infringe public policy. In many cases this will be clear. Where a statute forbids the sale of ungraded apples, then the court need only determine whether the parties have in fact concluded an agreement to sell ungraded apples.

In some cases, however, the matter is not so clear. A contract may not on its face oblige either party to infringe the policy of the law. For example, a car dealer may sell an automobile to a man. On its face the contract is unexceptional. Does the fact that the man may intend to use the car in a robbery render the contract illegal? Is public policy infringed by such a sale? In this chapter, we shall explore the issues raised by such cases.

It is increasingly recognized that the term "illegal contract" is not entirely apposite. For example, in *Thompson* v. *Biensch*,[2] the plaintiff and defendant entered into an agreement for the sale of cattle to be financed through the Export-Import Bank of the United States. If that were the end of the matter, the transaction could not be characterized as illegal. However, in order to obtain financing the parties made fraudulent misrepresentations to a bank. The plaintiff had taken an assignment of the bank's rights under the promissory note given as security by the defendants and brought an action upon it. It was held that the note was unenforceable because all the instruments in the transaction were tainted by illegality. The illegality was found in the false representations made with the intent to deceive.[3]

Transactions which are not illegal *per se* but which are "tainted by" or "connected with" illegality pose only one set of problems with which a court must deal in determining whether in fact a transaction violates the policy of the law. In a number of other cases, courts have recognized situations in which although *prima facie* the transaction violates the policy of the law, in the circumstances of the case refusing to grant relief would not vindicate that policy. Conversely, in a number of cases, courts have held that transactions which have only a tendency to bring about a result contrary to the policy of the law fall within the general rule. In this chapter we shall deal with these special cases.

B. Where One Party to the Transaction Has a Locus Poenitentiae

Courts have recognized that the policy of the law can best be furthered by permitting a party to a contract to resile from an agreement infringing public policy, provided the contract is "executory."[4] A party who has not yet

---

[1] There is no unanimity concerning how to categorize the cases dealing with this question: *cf.* M.P. Furmston, *The Analysis of Illegal Contracts*, (1966) 16 U. of T. L.J. 267; Report of the Contracts and Commercial Law Reform Committee (N.Z.), *Illegal Contracts* (1969), and E.K. Teh, *Bringing Assumpsit on Illegal Contracts*, (1971-72) 4 Tas. U.L. Rev. 219. In *Chitty on Contracts—General Principles* (24th ed. 1977) at 494, the effect of one party to an illegal contract being mistaken and the doctrine of *locus poenitentiae* is sandwiched between a discussion of property rights under illegal contracts and a discussion concerning the severance of illegal terms from an agreement.

[2] [1980] 6 W.W.R. 143 (Sask. C.A.).

[3] *See also Zimmerman* v. *Letkeman*, [1978] 1 S.C.R. 1097, 79 D.L.R. (3d) 508.

[4] Chitty, *supra*, n. 1, para. 1044, at 491. For a detailed examination of the law governing the right to repent, *see* R.M. Merkin, *Restitution by Withdrawal from Executory Illegal Contracts*, (1981) 97 L.Q. Rev. 420.

performed his obligations under the contract is said to have a *locus poenitentiae*. This phrase is often translated as a right to "repent," although it is clear that, in general, the plaintiff need not show himself to be blameless or genuinely repentant. In *McDonald* v. *Fellows*, Laycraft J.A. of the Alberta Court of Appeal, stated *per curia*:[5]

> Though the plaintiffs withdrew from this agreement from motives other than remorse, and though the term "repent" is used in some statements of the principle . . . no moral connotation usually seems to be involved.
>
> . . . Except in cases of gross moral turpitude the Courts have not inquired into the moral health or degree of reformation of the plaintiff who seeks to recover money paid on an illegal contract.

The main rationale for permitting a party to an executory illegal contract to obtain relief from the courts is that the plaintiff, if denied relief, might be tempted to go through with the illegal act in the hope of recouping his investment. Other rationales may be advanced. Wade has observed that there are four rationales underpinning the rule:[6] unjust enrichment ("fairness and justice"); encouraging parties not to carry out illegal contracts; giving a party to an illegal contract an opportunity to "repent" (*locus poenitentiae*); and permitting access to the courts only by those to whom no "moral stain" attaches. He concluded:[7]

> While selection of one of these bases as the true foundation of the doctrine would make much simpler the task of determining exactly at what point the plaintiff's right of action is lost, careful analysis indicates that no single basis is determinative and that there is some element of all of these suggestions present in the doctrine.

Once the illegal purpose has been partly effected, the right to "repent" is lost. Some cases suggest that the contract must be "wholly executory." This position has been criticized by Professor Wade on the ground that if the contract were wholly executory, the intervention of the court would not be necessary.[8] He concludes:[9]

> Obviously, the phrase is merely a striking way of saying that a very little amount of performance will prevent relief.

In Canada, the courts have adopted a less rigid approach by applying a test of "substantial performance." In *Zimmerman* v. *Letkeman*, a decision of the Supreme Court of Canada, Martland J. held, *per curia*:[10]

> . . . the rule as to *locus poenitentiae* is applicable to enable a party to an illegal contract, which is still executory, to recover what he has paid or transferred to his co-contractor, pursuant to the contract, provided he repents in time before the illegal purpose has been substantially performed.

The application of such a test requires the exercise of a certain amount of discretion. Whether the contract has been "substantially performed" is a question of fact in each case, and in determining that issue the courts will have regard to the magnitude of harm which would have resulted had the contract been carried out. In one case, the act of performance was the payment of a

---

[5] (1980) 105 D.L.R. (3d) 434 at 444-5. *See also* J.K. Grodecki, *In Pari Delicto Potior Est Conditio Defendentis* (1955) 71 L.Q. Rev. 255 at 263:

> It is, indeed, a significant fact that in none of the nineteenth-century decisions allowing recovery on the basis of the *locus poenitentiae* doctrine is it possible to discover any hint of repentance on the part of the successful plaintiff. . . . It is odd to see the late emergence of the somewhat elusive moral concept of repentance in a field where the dictates of morality have never been much heeded. It is odder still to see that moral concept coupled with the rule that the law is not concerned with comparative demerits and applied in a case where the conduct of the party resisting recovery has been "despicable in the extreme."

[6] J.W. Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, (1947) 95 U. of Pa. L. Rev. 261 at 263.

[7] *Ibid. at 287.*

[8] *Ibid.*

[9] *Ibid.*

[10] *Supra*, n. 3 at 522 (D.L.R.). In *McDonald* v. *Fellows*, [1979] 6 W.W.R. 544, Laycraft J.A. specifically concluded that substantial performance of the illegal arrangement had to be shown in order to bar an action.

deposit of $15,000 on a sale of land entered into on a Sunday, contrary to the *Lord's Day Act*.[11] It was held that this did not amount to substantial performance, and that the plaintiff could therefore recover the deposit. In contrast, in *Perkins* v. *Jones*,[12] the plaintiff sought to recover $500 paid to a contractor as part payment of the cost of constructing a bawdy house in Calgary. The balance of the cost was to be paid out of the proceeds of the operation. The contractor had bought and cleared the lot, and ordered sash and windows. The plaintiff's claim was dismissed because the contractor's acts were sufficient to bar any characterization of the contract as executory.

In discussing the time at which the right to repent is lost, Robert Merkin has suggested:[13]

> The choice appears to have rested between:
> (a) full performance or achievement of purpose;
> (b) the performance of any act, or achievement of any part of the purpose; or
> (c) "a partial carrying into effect of an illegal purpose in a substantial manner."
>
> Of these possibilities (a), as mentioned above, is consistent with the underlying policy considerations of the exception, but it leaves the defendant in a weak position. Possibility (b) limits the plaintiff's ability to prevent the illegal performance but it does have the sole merit of preventing the plaintiff from benefiting at the defendant's expense. Possibility (c) is little more than a compromise position and pays no attention to policy considerations whatsoever, and there can be little doubt that its original propounding by Fry L.J. in *Kearley* v. *Thomson* was motivated by the intention to limit what he regarded as an unwarranted exception to the *pari delicto* doctrine—it is certainly too rough and ready to be regarded as providing any balance of the interest of the parties, and does nothing to prevent the illegality. The original rule would thus appear to be the most acceptable.

Option (c), which Merkin criticizes, appears to be the one accepted in Canada.

Merkin also notes that the early cases concerning the application of this exception require as a precondition to relief, that the plaintiff be able to put the defendant back in the position he occupied prior to the formation of the illegal contract.[14] Modern courts appear to have lost sight of this element of the exception. This is probably due to the present insistence that the contract be substantially unperformed, in which case the requirement for *restitutio in integrum* is unlikely to give rise to any problem.

C. Where the Parties Act Under a Mistake of Fact or Law

In cases where a party to the contract was unaware of the illegal nature of the arrangement because he entered into it under an error of fact, courts have permitted a plaintiff to proceed with his action. In *Oom* v. *Bruce*,[15] the plaintiff successfully brought an action to recover insurance premiums paid to insure goods being transported by ship from Russia to England. Neither party was aware at the time the contract was made that Russia and Great Britain were at war. In *Dalgety and New Zealand Loan Ltd.* v. *Imeson Pty. Ltd.*,[16] the parties agreed to sell and purchase diseased cattle. The sale of a diseased animal was an offence, but the plaintiff was permitted to recover on the ground that the fact of one of the animals being diseased was unknown to both parties.

---

[11] R.S.C. 1970 c. L-13.
[12] (1905) 1 W.L.R. 41 (S.C.N.W.T. *in banco*).
[13] *Supra*, n. 4 at 427-428.
[14] *Ibid.* at 431–434.
[15] (1810) 12 East 225, 104 E.R. 87 (K.B.). *See* Wade, *supra*, n. 6 at 265 *et seq.*
[16] [1963] S.R. (N.S.W.) 998.

The courts have not been so lenient with a party operating under a mistake of law. In *Waugh* v. *Morris*, Blackburn J. stated:[17]

> [W]here a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not.

Similarly, where the parties enter into a contract forbidden by legislation, being mistaken as to a point of law will not avail the plaintiff. In *Kiriri Cotton Co. Ltd.* v. *Dewani*,[18] the plaintiff had received erroneous advice from his solicitors. Nevertheless the Privy Council, per Lord Denning, declined to grant relief to the plaintiff unless he could show that his case fell within an exception to the general rule.

Wade has criticized this distinction between mistakes of law and fact. He states:[19]

> Undoubtedly the courts are correct in holding that a plaintiff is entitled to restitution when he did not know of the facts making the contract illegal; none of the reasons usually given for refusing restitution are applicable here. On the other hand, the wisdom of following here the old distinction between mistakes of law and mistakes of fact is more questionable. When the rule of law which has been violated does not express a very strong policy, courts may on occasion be ready to give relief in spite of the fact that the only mistake was one of law. The only real limitation on the scope of the exception, as it applies to mistakes of fact, is that the plaintiff must refuse to go on with the contract as soon as he finds that it is illegal. His prior innocence does not aid him if he proceeds with the transaction.

Wade goes on to note the difficulty of distinguishing fact from law.

In a recent Report on Benefits Conferred Under a Mistake of Law,[20] we recommended that a party should not be denied relief merely because he made a mistake of law if relief would have been granted had the mistake been one of fact. Upon the implementation of this recommendation, a party seeking relief from the consequences of entering into an illegal contract will have a *prima facie* right to relief if he was mistaken concerning the legality of an agreement. Whether that error is one of fact or law would generally be irrelevant.

D. Where the Transaction Could be Performed Innocently

The court will deny relief to the parties to a transaction who intend thereby to further an illegal object, or who intend to perform in an illegal fashion, even though the transaction would be perfectly legal and enforceable if made for another purpose or performed in another fashion. It is only necessary that the parties have the "wicked intention"[21] of performing the transaction in an illegal fashion or bringing about an illegal object.[22] In *Ewing* v. *Osbaldiston*,[23] the plaintiff and defendant formed a partnership to manage a theatre. The theatre was licensed for music and dancing, but could not be licensed for the theatrical performances which both parties intended to stage. Lord Cottenham L.C. stated:[24]

> The question is, not whether the premises might not have been used for a legal purpose, but whether the contract between the parties, and their partnership, and

---

[17] (1873) L.R. 8 Q.B. 202 at 208. *See also Miller* v. *Karlinski*, (1945) 62 T.L.R. 85. *Waugh* v. *Morris* has been followed in South Africa: W.P. Schutz, *Illegal "Purpose" in Contract*, (1960) 77 S.A.L.J. 144. *Kennedy* v. *Steenkamp*, [1936] C.P.D. 113; to the same effect, *see Central Trust Co.* v. *Rafuse*, (1983) 147 D.L.R. (3d) 260 (N.S.S.C.-A.D.) at 270–272.

[18] [1960] A.C. 192 (P.C.).

[19] *Supra*, n. 6 at 267-268.

[20] L.R.C. 51, 1981.

[21] The phrase is that of Blackburn J. in *Waugh* v. *Morris*, (1873) L.R. 8 Q.B. 202 at 208.

[22] *See* G.H.L. Fridman, *Illegal Contracts* (1957) 107 L.J. 3.

[23] (1836) 2 My. & Cr. 53, 40 E.R. 561.

[24] *Ibid.* at 85, 572.

their intentions, were not altogether to use them for an illegal purpose: and undoubtedly such was the fact.

It is otherwise where one party is ignorant either of the other party's illegal object, or of his intent to perform the contract in an illegal fashion. As Devlin J. pointed out in *Archbolds (Freightage) Ltd.* v. *Spanglett Ltd.*:[25]

> If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all.

A party who seeks to enforce an otherwise illegal contract on the ground that he did not share the illegal intent or acquiesce in the illegal mode of performance must show himself to be "innocent."[26] A party who is "grossly negligent" concerning the possibility that the arrangement he has made might be illegal is not "innocent" within the meaning of this rule. In *Askey* v. *Golden Wine Co. Ltd.*,[27] the plaintiff's supplier of liquor had been convicted of producing and selling liquor unfit for human consumption. Acting on the supplier's assurance that the product produced for him was not adulterated, the plaintiff continued to distribute the product. Eventually the plaintiff was himself convicted of selling adulterated liquor and was compelled to refund the purchase price of the remaining stock to its purchasers. His action for damages against his suppliers was dismissed. Denning J. held:[28]

> There are three reasons why the plaintiff had to repay the retailers: (i) the fact that the liquid was contaminated by the addition of methylated spirit; (ii) the fact that the plaintiff had sold the contaminated liquid and had been negligent in not discovering that it was contaminated; and (iii), the fact that the plaintiff had, in consequence been convicted of the offence. If he had never been prosecuted and the inevitable publicity attaching to it had thus been avoided, it is very possible that in many cases the contamination would not have been discovered by the retailers or consumers. The contamination was not apparent in the small doses in which cocktails are usually taken. It was only apparent by its ill effects when the cocktails were taken copiously. If it were not for these prosecutions, therefore, the plaintiff might have escaped without repaying the money. Thus, two out of the three cases for the repayments (being the second and third clauses above) were due to his own criminality, not in the sense of a positively wicked mind, but in the sense of a grossly negligent one—negligence which the legislature considered so serious that it should be regarded as a crime. Does that debar him from claiming damages from those guilty of the contamination? I think it does. Speaking generally, public policy requires that no right of indemnity or contribution or damages should be enforced in respect of expenses which the plaintiff has incurred by reason of being compelled to make reparation for his own crime.

Where the plaintiff is in a position in which it is reasonable to assume that the defendant will act legally, he will not be deemed "negligent" if he fails to make inquiries. A servant may assume that his master will not permit him to drive an improperly insured vehicle,[29] and a builder may assume that an architect who has undertaken to obtain a necessary licence will do so, and may sue the architect for breach of warranty.[30] The plaintiff need not be so careful when the illegality is technical, and not an act *malum in se*.[31]

Enforcing the contract at the instance of an innocent party is in effect a determination that the public policy involved does not require the court to

---

[25] [1961] Q.B. 374, [1961] 1 All E.R. 417 at 388 (Q.B.). *See also* Devlin J's judgment in *St. John Shipping Corporation* v. *Joseph Rank Ltd.*, [1957] 1 Q.B. 267 at 283.

[26] *See* Fridman, *supra*, n. 22 at 4, *Newland* v. *Simons & Willer (Hairdressers) Ltd.*, (1981) Times, 16 April, Halsbury's Monthly Review, May 1981.

[27] [1948] 2 All E.R. 35 (K.B.).

[28] *Ibid.* at 38.

[29] *Gregory* v. *Ford*, [1951] 1 All E.R. 121.

[30] *Strongman (1945), Ltd.* v. *Sincock*, [1955] 3 All E.R. 90 (C.A.).

[31] *Marles* v. *Philip Trant & Sons Ltd.*, [1953] 1 All E.R. 651 (C.A.). It has been suggested that a party to an illegal contract who has no practical alternative but to resort to an illegal provision should also be regarded as "innocent." *See* Gillance & Khan, *Effect of Illegality in Contract of Employment*, (1981) 125 Sol. J. 212.

decline relief. The policy of the law is not furthered by punishing a party who was unaware that the contract violated that policy. To do so would be to reward the "guilty" party. A party who intends no "wicked" result does not infringe the policy of the law by entering into a contract which, on its face, is perfectly proper.

E. The Transaction has a Tendency to Contravene Public Policy[32]

1. Generally

We have noted that a contract perfectly proper on its face may have sinister implications when considered in the surrounding circumstances. It is perfectly proper to engage an agent to return to Germany to clear up a misunderstanding with one's employers. However, where the misunderstanding concerns one's espionage activities, and the agent must explain matters to the Nazi intelligence service, the agent may not recover her salary and expenses since the result of her activities was to assist in the conduct of espionage operations.[33]

M.P. Furmston has suggested that the cases concerning contracts which are illegal because they have a tendency to bring about results contrary to public policy are not readily susceptible to legal analysis. He states:[34]

> Although it is well established that contracts can be held illegal because of their improper tendencies, the decision as to whether a contract falls into this class is more difficult than that of ascertaining the content of the previous classes. The reason for this is easily apparent. As Parke B. said in *Egerton* v. *Brownlow*, "there are few contracts in which a suspicious mind might not find a tendency to produce evil; and to hold all such contracts to be void would indeed be an intolerable evil." Accordingly it is not enough to show that the contract might tend to encourage improper conduct in order to impeach it; on the other hand, in order to sustain it, it is not sufficient to show that it could be performed without any impropriety or even that it was intended to be and was in fact performed without impropriety. The result is that the courts are left with the very difficult task of weighing a number of imponderable factors so as to decide whether the improper tendency is sufficiently great to justify treating the contract as illegal.

Furmston isolates three kinds of cases in which a seemingly innocent arrangement has been held illegal because it tends to bring about a result contrary to the policy of the law. We will examine each of the three heads of cases isolated by Furmston. We are of the view, however, that although it is possible to categorize the cases in the manner Furmston adopts, the central concept invalidating the contract in each case is its tendency to promote a result contrary to public policy. Furmston's analysis is, however, useful insofar as it illustrates the different factual contexts in which a "tendency" argument might arise.

2. Agreements to Abstain from Doing an Act Where the Law does not Impose a Duty to Act but does Disapprove of Trafficking in Inaction

Contracts to stifle a prosecution, contracts in restraint of marriage and contracts in restraint of trade all fall within this category. The law does not, for example, impose a duty to marry. However, a contract which has as one of its

---

[32] The "tendency" cases are admittedly difficult to analyze. It should be noted, however, that this analysis is one employed by the courts, which have specifically adopted the word "tendency" as a test of illegality, with all its obvious faults. *See Egerton* v. *Brownlow*, (1853) 4 H.L. Cas. 1, 10 E.R. 359, *Slater* v. *Mall Finance & Investment Co.*, [1976] 7 N.Z.L.R. 1.

[33] *Crockett* v. *Wiedemann*, (1941) 39 F. Supp. 266.

[34] *Supra*, n. 1 at 297.

terms a provision which inhibits a party from marrying has a tendency to make marriage less desirable. Since it is generally accepted that marriage and family are important institutions in our society, any covenant which might discourage a person from acquiring spouse and children has an obvious tendency to bring about undesirable results.

Neville v. *Dominion of Canada News Company Limited*[35] is an important illustration of this category. The plaintiff was a director of a company engaged in promoting and selling land near Regina, Saskatchewan. The advertising placed by the company had been criticized as misleading by both the press and the Regina Chamber of Commerce. The defendants were publishers and proprietors of *Canadian News*, a weekly magazine purporting to give advice and news to investors in Canadian land. They were indebted to the plaintiff in the sum of £1490. The plaintiff, on certain conditions, agreed to accept only half that sum. One of the conditions was that:[36]

> . . . the defendant company should not publish in *Canadian News* or in any other newspaper or periodical published by the defendant company any comment upon the land company, or its directors, or its business, or in regard to the land owned by the land company in or near Regina, Saskatchewan, or any comment upon any company with which the defendant company had notice that the land company was connected or concerned.

Pickford L.J. held that these conditions were contrary to public policy:[37]

> I cannot put this matter in any better words than those used by Atkin J. in his judgment: "To my mind, for a newspaper to stipulate for a consideration that it will refrain from exercising its right of commenting upon fraudulent schemes, when it is the ordinary business of the company"—that means the newspaper company—"to comment upon fraudulent schemes, is in itself a stipulation which is quite contrary to public policy, and which cannot be enforced in a Court of law." With that I entirely agree. . . .

3. Agreements to Do an Act Which is Legal, But Which is Held to Promote a Tendency Towards a Result Which is Contrary to the Policy of the Law

Furmston cites cases dealing with contracts in consideration of future cohabitation outside of marriage, marriage brokerage agreements, promises to marry by persons already married and conditions annexed to testamentary gifts as examples of this class of case. Perhaps one of the clearest examples of the difficulties posed by a contention that a transaction should be regarded as illegal due to a tendency to bring about a result contrary to the law is the last example given by Furmston. In *Egerton* v. *Brownlow*,[38] a gift was given by will on condition that the donee acquire the title of Duke or Marquis of Bridgwater within five years. The condition was held to be contrary to public policy on the ground that it might promote the use of corrupt means to secure elevation to the peerage. Eleven judges were summoned to the House of Lords to be consulted. Nine thought it was legal and two illegal, while the House voted 4-1 that it was illegal notwithstanding that advice.

---

[35] [1915] 3 K.B. 556 (C.A.).
[36] *Ibid.* at 557.
[37] *Ibid.* at 567.
[38] *Supra*, n. 32.

4. Agreements to Do an Act, Which is Legal But Which Is Intended (By One or Both Parties) to Provide a Setting for an Act, Which is Contrary to the Policy of the Law

Even though the judges in *Egerton* v. *Brownlow* warned of the danger of seeing improper tendencies in every transaction,[39] the argument that a contract has improper tendencies is easily advanced. This is particularly so when something in the personal character of one of the parties makes him particularly likely to engage in illegal or immoral activities. Hence in *Pearce* v. *Brooks*,[40] an action brought against a prostitute for the hire of a carriage failed on the ground that it had a tendency to promote prostitution, while in *Upfill* v. *Wright*[41] an action by a landlord for rent unpaid against a tenant failed because the amount of the unpaid rent was in part a payment to the tenant by her lover in compensation for being his mistress. This had a tendency to promote illicit fornication, which, while no longer punishable by law, was held to be contrary to public policy.

In both these cases, the hire or lease was effective to provide the "setting" in which the immoral or illegal activity was to take place. It has been held that when the activity which is to take place is illegal, and is discovered after the contract has been executed, the landlord or lessor of goods is required to refuse to implement the contract. In *Cowan* v. *Milbourn*, Kelly C.B. stated:[42]

> I therefore do not hesitate to say that the defendant was not only entitled, but was called on and bound by the law, to refuse his sanction to this use of his rooms.

The ambit of this category is uncertain. If applied arbitrarily, it would result in a prostitute being unable to enter into an enforceable contract. In one sense everything a prostitute purchases enables her to ply her trade.[43] However, courts have been fairly flexible in characterizing transactions which arguably have a tendency to make it easier for a prostitute to carry on business. Accordingly courts have upheld contracts both to wash[44] and to sell a prostitute's clothes,[45] even though they might be, or were, used in her trade.

---

[39] *See ibid:* Alderson B. at 109, 403 and Park B. at 127–9, 410-11. *See also* the fictional case of *The Postmaster-General* v. *Slot*, (The Bookmaker's Telephone), by A.P. Herbert, Uncommon Law, paperback edition, 1977, at 333. A.P. Herbert parodies the common law in a fictional judgment denying the Post Office any right to claim for charges owing on a telephone used by a bookmaker, on the ground that he could not engage in his business without it.

[40] (1866) L.R. 1 Ex. 213.

[41] [1911] 1 K.B. 506.

[42] (1867) L.R. 2 Ex. 230 at 234.

[43] *Ibid. per* Bramwell B.

[44] *Lloyd* v. *Johnson*, (1798) 1 Bos. & Pul. 340, 126 E.R. 939.

[45] *Bowry* v. *Bennet*, (1808) 1 Camp. 348, 170 E.R. 981.

CHAPTER V EXCEPTIONS TO THE GENERAL RULE

A. Introduction

The general rule is subject to exceptions, some of which vindicate certain policies of the law, and others of which are purely technical devices used by the courts to evade the harsh results that would flow from applying the general rule. As one commentator noted:[1]

> So many broad exceptions to the general rule have developed, however, that it may be more accurate to say that some form of redress may be obtained under the illegal contract in many instances, rather than stating categorically that such an agreement is unenforceable.

We shall deal with these exceptions individually.

B. The Parties Are Not in Pari Delicto

As we noted in Chapter I, one of the Latin maxims often cited in illegal contract cases is *in pari delicto potior est conditio defendentis*. The opening words of the maxim require the parties to be in roughly equivalent positions. The maxim may apply even if both parties are aware of the illegality of their arrangement, although the plaintiff's burden in such a case will be onerous.[2] Where one party is not aware of the illegality, he may claim relief because the parties are not *in pari delicto* and, as we noted in Chapter IV, the policy of the law is not violated.

As we also noted earlier, where the law forbids a certain kind of transaction, the courts will, as a general rule, refuse to intervene to readjust relations between the parties to an illegal contract. In *Waugh* v. *Morris*,[3] Blackburn J. expressed the view that if a contract cannot be performed without violating the law, it is void whether the parties were mistaken or not. Where the law expressly forbids the formation of the contract, the same rule should apply. Nevertheless, in certain cases the courts have extended the qualification that relief may be granted when the parties are not *in pari delicto* to cases where the contract is one which the parties are expressly forbidden to make.

In *Neider* v. *Carda of Peace River District Ltd.*,[4] the Supreme Court of Canada granted restitution to a party to an agreement to transfer land contrary to both the *Lord's Day Act* and the Alberta *Land Titles Act*. The Alberta Court of Appeal had reversed the trial judge's decision on the ground that the parties were *in pari delicto*. Notwithstanding the express prohibition contained in the *Lord's Day Act* against any contract executed on a Sunday, the Supreme Court of Canada was prepared to restore the plaintiff's property to her, on the ground that under section 4 of the *Lord's Day Act*, the defendant had a primary duty not to carry on his business on a Sunday.[5]

Fraud, duress, oppression at the hands of the defendant and abuses of fiduciary position constitute the most obvious examples of factors which will lead a court to conclude that the parties to an illegal contract are not *in pari delicto*.[6] However, it is clear that a party may be held to be more at fault even where he has not engaged in conduct necessarily deserving censure.

---

[1] Case comment, (1960) 45 Pa. L. Rev. 917 at 918.

[2] *See, e.g., Rosemay* v. *Nuberg & Dale Construction* (1982) 40 O.R. 2d 152 (Ont. H.C.D.C.) in which relief was denied as the parties were *in pari delicto*, both knowing of the illegality.

[3] (1873) L.R. 8 Q.B. 202 at 208.

[4] [1972] S.C.R. 678, [1972] 4 W.W.R. 513, 25 D.L.R. (3d) 363.

[5] *Ibid.* at 518 (W.W.R.).

[6] *McDonald* v. *Fellows*, [1979] 6 W.W.R. 544 at 554 (Alta. C.A.). *See also Erwin* v. *Snelgrove*, [1927] 4 D.L.R. 1028 (Ont. S.C.-A.D.) (illegitimate pressure).

The leading case extending the ambit of this exception is *Kiriri Cotton Co. Ltd.* v. *Dewani*,[7] a decision of the Privy Council. The respondent was sub-lessee of a flat in Kampala, Uganda. Contrary to the Ugandan *Rent Restriction Order* then in force, the respondent secured possession of the flat by paying "key money" of 10,000 Ugandan shillings to the appellant. After taking possession of the flat, the respondent successfully brought an action to recover that "key money."

The respondent contended that relief should be granted, notwithstanding the illegal nature of the payment, because the parties were not *in pari delicto*. This argument was accepted by the Privy Council, even though the case was not one of fraud or oppression. Lord Denning held *per curia*:[8]

> . . . if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other—it being imposed on him specially for the protection of the other—then they are not *in pari delicto* and the money can be recovered back: see *Browning* v. *Morris*, by Lord Mansfield. Likewise, if the responsibility for the mistake lies more on the one than the other—because he has misled the other when he ought to know better—then again they are not *in pari delicto* and the money can be recovered back; see *Harse* v. *Pearle Life Assurance Co.*, by Romer L.J.

The broad test of responsibility for a mistake (or "duty of observing the law"), as presently articulated by the courts, constitutes a serious incursion into the the general rule. The justification for such a departure is not merely that the civil law maxim requires the parties to be "*in pari delicto*." Rather, it is that a party who is in an inferior position—i.e., the primary responsibility for observing the law is placed on the other party—should not suffer the consequences of the other person's failure to observe the law. The policy of the law or of a statute is not served by denying access to the court to a party who did not voluntarily infringe it.

The application of the *in pari delicto* exception was expressly canvassed by the Supreme Court of Canada in *The Hydro Electric Commission of Nepean* v. *Ontario Hydro*.[9] In that case, the majority, per Estey J. held that the *in pari delicto* rule had no application to a payment made under a common mistake of law, as opposed to an illegal contract. While the majority doubted whether it was correct even in an illegal contract case to interpret the *Kiriri Cotton* case as authority for a general rule respecting "responsibility for a transaction" rather than a more limited rule respecting the protection of a specified class[10] (an exception discussed later in this chapter), no general attack was mounted on the broader aspects of the *in pari delicto* exception in the case of an illegal transaction. In particular, the majority seemed to accept the exception insofar as it applies in cases of duress, fraud, or other vitiating factors.[11]

C. The Plaintiff is a Member of a Protected Class

Where a statute invalidates a transaction to protect a certain class of individuals, it has long been recognized that to decline to grant relief at the instance of a member of the protected class would render the statute nugatory. It would result in the defendant using a protective statute to retain an illegal benefit at the expense of the person the legislation is designed to protect.

---

[7] [1960] A.C. 192.
[8] *Ibid.* at 204.
[9] (1982) 132 D.L.R. (3d) 193; 41 N.R. 1; 16 B.L.R. 215 (S.C.C.).
[10] *Ibid.* at 226 *et seq.* (D.L.R.).
[11] *Ibid.* at 233, 239, 242. (D.L.R.).

A recent example of the application of this exception is *Re Ontario Securities Commission and British Canadian Commodity Options Ltd. et al.*[12] In this case, the clients of an unregistered trader in securities sought to rescind their contracts and recover the purchase price of the securities. The trader, a limited company, was in receivership. The issue before Grant J., of the Ontario High Court, was whether the clients were entitled to rank as creditors, since their claim was based on an illegal contract. He held that they could pursue their claims because they fell within the exception to the general rule where "one party is the one prohibited and the other is of the group of persons for whose protection the prohibiting statute was passed."[13]

Whether this exception is classed by itself or merely as an example of the *in pari delicto* rule does not seem crucial. If it is the latter, then it is odd insofar as the member of the protected class would be considered "innocent" on the ground of his membership in the protected class alone, even though he may very well have been part of a conspiracy to avoid a mandatory regulation. For example, if a contract to sell an uninspected appliance is forbidden in order to protect a consumer, should a consumer who specifically induced a supplier to sell an uninspected appliance, knowing it to be uninspected, be able to avoid the contract and recover the price? Whatever its proper category, this exception is well established, and examples may be found readily in the cases.[14]

D. The Plaintiff Need Not Rely on the Illegal Transaction

The substance of this exception was set out by Haines J. of the Ontario High Court, in *Rogers* v. *Leonard*.[15] The plaintiff sought specific performance of a contract for the sale of a cottage. The agreement was executed on a Sunday, contrary to the *Lord's Day Act*. The vendor brought a counterclaim for possession of the cottage. The action for specific performance failed because the contract was illegal. However, the claim for possession succeeded on the basis that the action was framed in such a way that the illegal contract was not relied upon. The defendant was able to rely on his prior title to the cottage in order to evict the plaintiff, whose right to possession could not be proved without invoking the unlawful arrangement.

There are a number of cases where the courts have permitted a party to an illegal transaction to obtain restitution, provided the action can be framed in such a way as to avoid mention of the illegal transaction. In *Elford* v. *Elford*,[16] a wife successfully pleaded that her husband had fraudulently abused a power of attorney to transfer land owned by her. Her husband's defence was that she had only obtained the land in the first place by conspiring with him to defraud his creditors. Anglin J. of the Supreme Court of Canada, held:[17]

> In order to succeed the plaintiff merely requires to establish that in executing the transfer to himself of the property in question, which stood registered in her name her husband committed a fraud on the power of attorney from her under which he professed to act. She does not have to disclose the alleged intent to defraud her husband's creditors in which her own title to the land is said to have originated, or to invoke any of the transactions tainted by that fraud . . . . It is the defendant who brings that aspect of the matter before the Court in his effort to retain the fruits of his abuse of his position as his wife's attorney; and to him the maxim applies *nemo allegans turpitudinem suam est audiendus*.

---

[12] (1979) 93 D.L.R. (3d) 208.

[13] *Ibid.* at 214. *See also Sidmay Ltd.* v. *Wehtsum Investments Ltd.*, (1967) 61 D.L.R. (2d) 358, [1967] 1 O.R. 508 (C.A.); *Hydro Electric Commission of Township of Nepean* v. *Ontario Hydro*, *supra*, n. 9.

[14] *See, e.g., Haug & Nellermoe* v. *Murdoch*, (1916) 26 D.L.R. 200 (Sask. S.C.) (traction engine did not comply with the *Steam Boilers Act*, R.S.S. 1911, c. 22); *Chambers* v. *Pennyfarthing Dev. Corp. et al.*, (1983) 43 B.C.L.R. 262 (B.C.S.C.) (recovery of down payment on sale of strata lot because vendor failed to file prospectus).

[15] (1973) 39 D.L.R. (3d) 349.

[16] (1922) 64 S.C.R. 125, 69 D.L.R. 284, [1922] 3 W.W.R. 339.

[17] *Ibid.* at 286-7 (D.L.R.).

In *Keystone Fisheries Ltd.* v. *Leftrook and Mid-West Truck Lines Ltd.*,[18] the defendant illegally transported frogs into Manitoba. He was not licensed to transport frogs. The frogs died because they were improperly handled. The plaintiff's action for damages succeeded, as the action could properly be framed in tort without any need to rely on the contract.[19]

This exception is undoubtedly the most curious and technical of all. As Waddams notes:[20]

> The logical basis of this exception is obscure — indeed its very existence throws doubt on the soundness of the basic rule against recoverability of property transferred. The courts are ambivalent. If an illegal lease is void it might be supposed that it would not be effective to transfer any interest in land. But property transferred is irrecoverable because the court will not "lend its aid to such a plaintiff" as the guilty lessor. Then can the tenant retain possession forever? The courts have stopped short of this logical but drastic conclusion by adopting the theory that after the lease has expired the lessor can rely on his "independent" property interest. But surely his right to repossession of the land on termination of the lease by lapse of time is no more "independent" of the lease than his right to repossession for non-payment of rent. The truth seems to be that the courts have evolved the theory of independent interests as a technique of limiting the enrichment that would otherwise enure to the defendant.

Although the technique undoubtedly does prevent unjust enrichment, it does not do so in a rational fashion. Whether the exception can be invoked depends on clever pleading. Moreover, in any particular case, whether the plaintiff or defendant is able to frame his case without reference to the illegal transaction may be largely fortuitous.

When applying the exception, the court must ignore the fact that both parties are rogues — as in *Elford* v. *Elford* — or even that the exception benefits a rogue over a person who is completely blameless. In *Rogers* v. *Leonard*, the plaintiff's action was dismissed:[21]

> . . . with regret, as the plaintiffs have at all times proceeded in good faith and with a genuine intent to comply with all laws. The defendant, on the other hand, knowingly breached the *Lord's Day Act*, only to rely on her own illegal breach, and actively opposed the plaintiffs in their attempt to comply with the *Planning Act* by obtaining the consent of the Land Division Committee to severance. While the defendant is entitled at law to succeed on the basis of the technical defences set out, her actions throughout have been characterized by gross bad faith, and in view of this, I dismiss the plaintiffs' action without costs.

Although the blameless plaintiffs' claim failed, the guilty defendant was successful.

Another problem concerning the operation of this exception may be identified. On occasion courts have held that whether or not illegality is pleaded, if it arises on the facts the court must deny relief based on the agreement.In *Menard* v. *Genereux*, Krever J. of the Ontario High Court held:[22]

> Both the plaintiff Menard and the defendants were equally involved in the deception for the shared purpose I have described and both were asserting claims. It is, however, well established that whether or not they are pleaded, if facts are shown in the course of a trial which may render an agreement unenforceable by reason of illegality or public policy a court must take these facts into consideration and, depending on the circumstances, act upon them if necessary by refusing to lend its assistance to a party seeking to enforce his or her rights by relying on the

---

[18] (1959) 16 D.L.R. (2d) 680 (Man. C.A.).

[19] *See also Coplan* v. *Coplan*, [1958] O.R. 551, 14 D.L.R. (2d) 426 at 430 (D.L.R.) (Ont. C.A.) *et seq.*; *Leaper* v. *Grenadier Developments Ltd.*, (1982) 138 D.L.R. (3d) 540 (B.C.C.A.).

[20] Waddams, *The Law of Contracts* (1977), at 357-8.

[21] *Supra*, n. 15 at 362.

[22] (1982) 138 D.L.R. (3d) 273 (Ont. H.C.) at 282. *See also* case comment, P. McLaughlin (Vol 11) No. 6, Business Life, Canada's Business Magazine, June 1983 at 12. To the same effect, *see Re Mahmoud and Ispahani*, [1921] 2 K.B. 716, [1921] All E.R. Rep. 217; *Foster* v. *Barry*, [1983] 5 W.W.R. 315 (B.C.S.C.).

> agreement. See, for example, the judgment of the Court of Appeal of Saskatchewan in *Williams* v. *Fleetwood Holdings Ltd. et al.*, (1973), 41 D.L.R. (3d) 636 at p. 640, adopting the language of Scott L.J. in *Alexander* v. *Rayson*, [1936] 1 K.B. 169 at p. 190: "The moment that the attention of the Court is drawn to the illegality attending the execution of the lease, it is bound to take notice of it, whether such illegality be pleaded or not.

If the court is bound to take notice of the illegality of an agreement even if it is not pleaded, it is difficult to see on what ground illegality should be ignored merely because a case can be framed in which the agreement is not an essential element.

Insofar as the exception may be used to prevent unjust enrichment, it is an exceptionally blunt instrument. It does so without regard to the justness or unjustness of the enrichment. Arguably, the result in the *Rogers* case would have been fairer if the general rule had been applied.

E. Severance

1. Generally

It is possible that a covenant requiring the parties to a contract to perform an illegal act may be only one of a number of mutually independent obligations. Indeed, it may not be one of the more important covenants in a contract. It is not surprising, therefore, that courts have generally been reluctant to characterize a whole contract as illegal merely because one obligation was contrary to the policy of the law. Accordingly, the courts, from time to time, have severed an "illegal" covenant from a contract, and enforced the balance of the contract's terms. The parties may expressly provide for such severance, or the court may sever an illegal term of its own accord.[23]

2. Express Severance

The parties to a contract may anticipate the possibility that their contract may contain illegal clauses. If so, they may expressly provide that obligations which are illegal may be severed without affecting the balance of the agreement. This is especially useful where the parties are in doubt concerning a foreign law, as in *Nike Infomatic Systems Ltd.* v. *Avac Systems Ltd.*,[24] where the franchise agreement stipulated:

> This agreement is to be governed by and construed according to the laws of the Province of B.C. If, however, any provision in anywise contravenes the laws of any state or jurisdiction where this agreement is to be performed, such provision shall be deemed not to be a part of this agreement therein.

3. In the Absence of Agreement

(a) Generally

The advantage of expressly providing in a contract for severance is that it removes any doubt that the balance of the contract may stand on its own. In the absence of such an agreement, the court must consider whether the illegal obligation is central to the contract, and whether its severance would so substantially alter the obligations undertaken that the contract should either stand or fall as a whole.

The authorities dealing with severance have been described as "a forest of decisions with their tangled undergrowth of *dicta*."[25] Nevertheless, one commentator has concluded that at least some broad principles have emerged. In a recent article entitled "Illegality and Severability in Contracts,"[26]

---

[23] *See, e.g. Proto Manufacturing Ltd.* v. *Deutsch*, (1982) 37 O.R. (2d) 528 (Ont. H.C.) at 543.

[24] [1980] 1 W.W.R. 528 at 530 (B.C.S.C.).

[25] *Per* Windeyer J. in *Brooks* v. *Burns Philip Trustee Co.*, 121 C.L.R. 432 at 453.

[26] (1977) 13 U.W.A.L. Rev. 1.

McGarvie J. of the Supreme Court of Victoria, Australia, treated the two issues we have identified under the headings "technical possibility" and "imputed intention." For the purposes of this paper it is convenient to adopt his analysis.

(b) Technical Possibility

The initial question facing a court when considering whether to sever an illegal covenant is whether the balance of the contract can operate as a complete and workable agreement. The issue has been framed in a number of ways. In *Mason* v. *Provident Clothing and Supply Co. Ltd.*,[27] Lord Moulton held that the court may not delete a covenant which is "part of the main purport and substance" of the clause in which it appears, while in *Bennett* v. *Bennett*,[28] Denning L.J. stated that the balance of the agreement must "leave the rest of the deed a reasonable arrangement between the parties."

The difference between these tests is one of form, and not substance. In *Amoco Australia Pty. Ltd.* v. *Rocca Bros. Motor Engineering Co. Pty. Ltd.*,[29] the Privy Council had no difficulty in applying these tests in refusing to sever certain clauses respecting the sale of gasoline at the respondent's garage from the distribution agreement entered into by the parties. Lord Cross stated:[30]

> But whatever test be applied the answer must, their Lordships think, be the same in this case. It is inconceivable that any petrol company would grant a dealer a lease at a nominal rent of a site on which it had spent a substantial sum in installing pumps and other equipment without imposing on the dealer any obligation to buy petrol from it or even to carry on the business of a petrol station on the demised premises. Clauses 3(g), (h) and (i) were the heart and soul of the underlease. It is, of course, true that the appellant — perhaps because it had little faith in the point on which it rested its case in the Full Court — now thinks that it is to its advantage to affirm the continued existence of the underlease even though shorn of those three sub-clauses; but that fact has no bearing on the question at issue.

In severing an offensive clause the courts are reluctant to rewrite the contract, as Waddams notes:[31]

> The courts are naturally reluctant to undertake the rewriting of contracts, for then an employer, for example, would have nothing to lose by extracting from his employee outrageously wide covenants against competition. The worst that could happen would be that the covenants would be cut down by the court to reasonable size.

In *Putsman* v. *Taylor*, Salter J. stated:[32]

> The promise to be enforceable must be on the face of the document a separate promise, a separate compact, the subject of separate consideration and accord, the performance of which is independent of the performance of any other promises which the promisor may have made. If the promise is a separate promise and valid, the Court will enforce it. Whether it is separate or not depends on the language of the document. Severance . . . is the act of the parties, not of the Court."

This rigid attitude has resulted in a rule of thumb known as the "blue pencil test." As a general rule, the courts will "sever" a covenant by striking out the offending words with a figurative blue pencil. If what remains can fairly be read as an intelligible arrangement, it is open to the court to give effect to the balance of the transaction.[33]

---

[27] [1913] A.C. 724 (H.L.).

[28] [1952] 1 K.B. 249 at 261 (C.A.). *See also Furlong* v. *Burns & Co.*, (1964) 43 D.L.R. (2d) 689 at 701 (Ont. H.C.). In one American case it was said that the balance of the agreement must constitute an "intelligible economic transaction in itself." (1959) 358 U.S. 516 at 521.

[29] [1975] A.C. 561.

[30] *Ibid.* at 578.

[31] *Supra*, n. 20 at 359.

[32] [1927] 1 K.B. 37 at 640, *aff'd.* [1927] 1 K.B. 741 (C.A.), applied in *Pauze* v. *Gauvin*, [1954] S.C.R. 15 at 21, 27.

[33] Waddams, *supra*, n. 20 at 359; Fridman, *The Law of Contract in Canada* (1976) at 388; McGarvie J., *supra*, n. 26 at 4-5.

The power to wield the "blue pencil" is a limited one. Younger L.J. stated in *Attwood* v. *Lamont*:[34]

> The learned judges of the Divisional Court, I think, took the view that such severance always was permissible when it could be effectively accomplished by the action of a blue pencil. I do not agree. The doctrine of severance has not, I think, gone further than to make it permissible in a case where the covenant is not really a single covenant but is in effect a combination of several distinct covenants. In that case and where the severance can be carried out without the addition or alteration of a word, it is permissible. But in that case only.

It is insufficient that the balance of the agreement is grammatically correct, if the result of a liberal application of blue pencil is to place the remaining words in a different or unusual context.[35]

The blue pencil test has its critics. Waddams comments:[36]

> It is no more satisfactory to adopt what has been called the "blue pencil" test, whereby covenants are severable if they can simply be deleted without revision of the remaining words of the document. Plainly such a test invites evasion by careful drafting. A covenant not to compete (1) in Toronto, and (2) in the rest of Ontario, might, on such a test, be valid as to Toronto, whereas a covenant not to compete anywhere in Ontario might be wholly invalid. Such distinctions seem anomalous.

He concludes:[37]

> A more useful test, it is suggested, is whether the legal parts of the transaction are so closely tied in with the illegal parts that enforcement of the former will tend to subvert the policies underlying the rule of illegality. A significant factor is the seriousness of the illegality. Where an agreement is highly objectionable the courts are unlikely to favour a plea for partial enforcement. But where, as in the case of a covenant in restraint of trade, the agreement offends only by slightly overstepping the mark of what is permissible, severance is more readily made.

It is occasionally maintained that certain types of covenants are not severable. In an English decision, *Goodinson* v. *Goodinson*,[38] Somervell L.J. expressed the view that covenants in breach of the criminal law or *contra bonos mores* could not be severed. It does not appear that *Goodinson* has been followed in Canada.[39]

---

[34] [1920] 3 K.B. 571 at 593 (C.A.).

[35] *See, e.g., Peters Ice Cream (Vic.) Ltd.* v. *Todd*, [1961] V.R. 485 at 486 (S.C. Victoria).

[36] *Supra*, n. 20 at 359.

[37] *Ibid.* at 359-60. It would appear that there are limits on the parties' ability to facilitate severance by clever drafting. In *Austra Tanks Pty. Ltd.* v. *Running*, [1982] the court was asked to sever parts of a covenant in restraint of trade involving six possible periods of time, six activities, fourteen products, and 163 different areas, being a possible total of some 82,152 separate obligations. The whole of the covenant was held void for uncertainty. *See* case comment (1983) 57 Aus. L.J. 422.

[38] [1954] 2 Q.B. 118 (C.A.).

[39] In *Goodinson* v. *Goodinson*, *ibid.*, Somervell L.J. stated at 120-121:

> there are two kinds of illegality of differing effect. The first is where the illegality is criminal, or contra bonos mores, and in those cases such a provision, if an ingredient in a contract, will invalidate the whole, although there may be many other provisions in it. There is a second kind of illegality which has no such taint, the other terms in the contract stand if the illegal portion can be severed, the illegal portion being a provision which the court, on the grounds of public policy, will not enforce.

This limitation does not appear to have been applied in Canada, although *Goodinson* has been mentioned in two Canadian cases. It was distinguished in *Main* v. *Main* (1956) 18 W.W.R. (N.S.) 280 (B.C.C.A.) and applied on a different issue in *Furlong* v. *Burns & Co.*, (1964) 43 D.L.R. (2d) 689. *Goodinson* itself is based on Somervell L.J.'s decision in *Bennett* v. *Bennett*, [1952] 1 K.B. 249 at 254-255 (C.A.) in which it was noted that as a general rule the whole of a contract containing a covenant either contrary to the criminal law or *contra bonos mores* is unenforceable. It is, however, difficult to follow Somervell L.J.'s reasoning in *Bennett*, and no convincing reason is given why a subsidiary covenant *contra bonos mores* should not be severable. Are certain heads of public policy more important than others? It seems odd, for example, that a contract containing a subsidiary clause for future illicit cohabitation should void the whole contract, while the same contract containing a clause ousting the jurisdiction of the court should be enforceable after the ouster clause has been severed. It would appear that the better test of severability turns on the *nature* of the contract, rather than that of the illegality. Fridman, *supra*, n. 33 at 387 notes that:

> in reality the test of the effect of the contract, in terms of its being wholly illegal or only partially void, must depend upon: (1) the policy of the common law rule or statutory provision that is invoked, *viz.*, can it be limited in its scope and application, and (2) whether, in the circumstances, not only is the contract one that is potentially severable, but severable in fact, having regard to the way the parties have contracted. Thus, the application of the doctrine of severance rests upon the applicability of the idea to the type of contract that is in issue and upon the practical question whether the particular contract before the court, which is an example of the type of contract that is potentially severable, admits of severance.

(c) Imputed Intention

It is not enough that it is technically possible to sever a clause and still have a reasonable economic arrangement. McGarvie J. states in his article:[40]

> In the second step of the decision upon severance the court inquires whether it is fair and reasonable to impute to the parties the intention that, in the event of the provisions in question being unenforceable, the remaining provisions should operate as their contract.

As this heading suggests, generally, it will be impossible to infer an intent to be bound by the remaining terms of the agreement. Most parties contract on the basis that their mutual obligations are valid and enforceable.

This issue is closely linked with the question of technical possibility. It goes beyond merely determining that it is reasonably possible to sever a clause, to the issue of whether or not the result may fairly be imposed on an unwilling party. McGarvie J.'s choice of the term "intent" to describe the latter issue is defensible in this context, if somewhat artificial. In general, the courts are concerned with construing the agreement between the parties in order to salvage from its wreckage a reasonable and mutually acceptable arrangement.

It should, however, be noted that occasionally courts will refuse to sever an illegal covenant where it is determined that the illegal intent of the parties taints the whole contract. In *Mira Design Co. Ltd. et al* v. *Seascape Holdings Ltd.*, Huddart L.J.S.C. held, adopting a passage from Chitty:[41]

> . . . he recommends that the court determine "whether the illegal promise is substantially the whole or main consideration for the promise now sought to be enforced. If it is, then the court will not sever it. In my view, that is also a good test as to whether a contract is "fundamentally illegal."

The imposition of a "fundamentally illegal" test as a criterion for severability causes few difficulties if by it Huddart L.J.S.C. meant only that the severance of an offending clause will not divest the contract of its illegal nature. However, it is difficult to see how any contract forbidden by statute or contrary to public policy would not be "fundamentally illegal."

F. The Duty to be Honest

Not every defendant is able to shield himself behind a defence of illegality. In *Re Springer and The Higgins Co.Ltd. et al.*,[42] a liquidator of a company, with the written consent of its shareholders, agreed to pay a commission to Springer on the sale of certain real estate. Springer accordingly arranged a sale of the property. The sale was to close when the court's approval was received. One of the shareholders objected to the commission being paid, on the ground that Springer was not a registered real estate broker. Sections 33 and 38 of the Ontario *Real Estate and Business Brokers Act*[43] provided:

> 33. No action shall be brought for commission or for remuneration for services in connection with a trade in real estate unless at the time of rendering the services the person bringing the action was registered or exempt from registration and the court may stay any such action at any time upon summary application.
> 38. A person who is not registered as a broker shall neither directly or indirectly hold himself out as being a broker and a person who is not registered as a salesman shall neither directly nor indirectly hold himself out as being a salesman.

The liquidator applied to court for directions. The court was able to characterize Springer's services as being those of a person acting under the

---

[40] *Supra*, n. 26 at 9. *See also* N. S. Marsh, *The Severance of Illegality in Contract*, (1948) 64 L. Q. R. 230 and 347, and *Severance and Public Policy: An Addendum*, (1953) 69 L. Q. R. 111.

[41] [1982] W.W.R. 97 (B.C.S.C.) at 102.

[42] (1979) 24 O.R. (2d) 411 (Ont. Div. Ct.).

[43] R.S.O. 1970 c. 401.

orders of a liquidator and hence exempt from registration. Cromarty J. went on to state *per curia*:[44]

> I said earlier that Springer's position might be difficult had he been suing for remuneration. However, had he so sued, the liquidator might well have applied to the Court for advice and directions as to how he should plead in defence. If he had, in my opinion, a Court would have advised him to plead as a high-principled man would. In that event, the result would be the same.

In formulating a duty to be high-minded and honest, Cromarty J. cited cases such as *Ex Parte James*,[45] which we have discussed in our Report on Benefits Conferred Under a Mistake of Law.[46] In that Report we noted that a similar duty has been imposed on solicitors, receiver-managers and trustees-in-bankruptcy, and concluded:[47]

> There are two major problems with the defining of special classes subject to an obligation to be "fair" or "honest." The first derives from the absence in the reported cases of any criteria to be applied in determining either whether an individual falls within such a class or whether a new class should be created. Secondly, it is difficult to see why the standards of "fairness" and "honesty" imposed on such individuals should not be applied universally. Should the common law sanction less than the highest standards of honesty and fairness in any defendant?

To these two points we might usefully add a third. Directing the liquidator to plead like "a high-principled man" presumably involves refusing to plead an illegality. The result is to permit an action to be brought which the legislature has specifically provided shall not be maintained. Are the courts to lend themselves to the plaintiff's breach of the *Act*, firstly by ordering the liquidator to ignore the illegality of the arrangement and secondly by refusing to intervene *ex meru motu*?[48] It seems odd that the courts would assist a real estate broker carrying on an unlawful business by ordering a liquidator to be "honest" and pay the illegally earned commission.

---

[44] *Supra*, n. 42 at 422-423.

[45] (1874) L.R. 9 Ch. App. 609 (at 614 per James L.J.).

[46] (1981) L.R.C. 51, 53-54.

[47] *Ibid.* at 54.

[48] As in *Menard v. Generreux*, *supra*, n. 22.

CHAPTER VI THE EFFECT OF ILLEGALITY

A. Generally

An illegal transaction is unenforceable: the courts will not intervene to readjust the rights between the parties. Aside from the general prohibition against judicial intervention, however, are questions of property and title. Who owns a motor vehicle sold pursuant to an illegal contract when the purchase price is paid? Can a third party acquire good title? All of these questions are complicated by the intervention of statute. In this chapter we shall examine in greater detail the effect of characterizing a contract as illegal.

B. Unenforceability

It is often said that an illegal contract is "void" and "unenforceable." While these terms are often used interchangeably, they are not necessarily synonymous. How accurate an expression is "void?" Do the courts mean to say that in every case of illegality the agreement is ineffective to create any relationship between the parties?

In *Pimvicska* v. *Pimvicska*,[1] the court specifically addressed this issue. The parties had bought and sold bee-keeping equipment without the permission of an apiculture fieldman, as required by the Alberta *Bee Act*. The plaintiff sought a declaration that the contract was void. MacDonald J. held:[2]

> It has also been frequently stated in actions between the parties to a prohibited transaction that the contract is void or has no effect.
> . . . In these cases one of the litigants was a party to the prohibited transaction. In each case the Court refused to enforce the forbidden transaction. In certain instances the Courts have stated the contract was "void" which I take to mean without legal force or effect or not legally binding or enforceable.
> There seems to me to be a clear difference between a contract which is without legal force or effect and one which is not legally binding or enforceable. In one instance the sale of prohibited goods would be considered as no sale, preventing the passing of property or title, in the other case, the parties are only barred from seeking the assistance of the Courts to enforce their contract.

The judge noted that the sale had been completed and the money and goods had changed hands, and held that the sale was not void in the sense of being a nullity. It may have been unenforceable but as it was completed, the parties were fixed in the position they then occupied.[3]

A determination that an illegal contract of sale is "unenforceable," rather than "void," would appear to give the purchaser good title to the item purchased regardless of the illegality. We discuss the passing of title under an illegal transaction later in the Report. For the purposes of the discussion here, however, we wish to stress the dangers in using the terms "void" and "unenforceable" interchangeably.

This confusion of terminology is also present in legislation. A number of statutes not only expressly limit the power of individuals to contract, but also expressly provide for the consequences of breaching the statute. As we noted in Chapter II, neither the Revised Statutes of British Columbia nor those of Canada adopt a uniform terminology. This is illustrated by the statutory provisions set out in Appendix A.

In provincial and federal legislation, a number of legislative formulae are used. Contracts or provisions in contracts are said to "void," "null and

[1] [1974] 6 W.W.R. 512 (Alta. S.C.-T.D.).
[2] *Ibid.* at 517-518.
[3] *Ibid.* at 519.

void," "illegal and void," "void and of no effect," "void and unenforceable," or even "absolutely void." While some contracts are merely labelled "unenforceable," others are said to be "not binding," or actions to enforce contractual obligations are forbidden. The choice of language appears to be arbitrary.

It is clear that the lack of any consistent statutory formula combined with the uncertain interaction between statutes and the general rule could lead to confusion. This confusion is exacerbated by the willingness of courts to restrict the *prima facie* meaning of words such as "null and void." In *Spooner* v. *Spooner*[4] a wife claimed, *inter alia*, possession of certain lands sold by her husband without her consent. The *Dower Act*[5] provided that a sale without the wife's consent was "null and void." The wife contended that this had the effect of rendering the entire transaction a nullity. The Alberta Court of Appeal disagreed. Harvey C.J.A. stated *per curia*:[6]

> In *Choma* v. *Chmelyk*, only, of all the cases was it necessary to determine whether the words "null and void" meant absolutely so for the action was by the husband as well as the wife in which they sought to set aside a disposition made by the husband. On the facts of that case to declare that the disposition was absolutely null and void would have permitted the husband to perpetrate a fraud on the person to whom he made the sale. It is no doubt because of such probable consequence that the Courts from the time of the *Statutes of Elizabeth*, and perhaps long before, have been disposed to restrict the meaning of the words "null and void" though not limited by express words to what is sufficient to give effect to the clear purpose of the legislation.
>
> One cannot see in this legislation any matter of public policy beyond that of the protection of the wife, and one cannot suppose that the Legislature intended an effect going further than was necessary for that purpose, the consequence of which might frequently permit the commission of frauds.

In the result, the wife was denied possession. The court held that the transaction was invalid only to the extent of the wife's interest under the Act.

Other cases also illustrate the caution with which courts approach legislative pronouncements that a transaction is "void." In *Parker* v. *Taswell*[7] the plaintiff sought to enforce a lease not by way of deed, and therefore "void at law" under the provisions of an English statute,[8] on the ground that in equity the document would be regarded as an agreement to lease. The defendant objected that the transaction, being void, was a nullity and of no effect. Lord Chelmsford L.C. stated:[9]

> The Legislature appears to have been very cautious and guarded in language, for it uses the expression "shall be void at law" — that is as a lease. If the Legislature had intended to deprive such a document of all efficacy, it would have said that the instrument should be "void to all intents and purposes." There are no such words in the Act. I think it would be too strong to say that because it is void at law as a lease, it cannot be used as an agreement enforceable in equity, the intention of the parties having been that there should be a lease, and the aid of equity being only invoked to carry that intention into effect.

Similarly, in *Hughes* v. *Palmer*,[10] Byles J. expressed the view that "void" used alone might mean "voidable," and that in any event the consequences of a transaction being void were not so drastic as if the transaction were "null and void to all intents and purposes whatsoever."

The use of different terms to limit the effect of transactions leaves room for argument whether the use of any particular term will be effective to

---

[4] [1939] 2 W.W.R. 237, [1939] 3 D.L.R. 148 (Alta. S.C.-A.D.).

[5] R.S.A. 1922, c. 135.

[6] *Supra*, n. 4 at 241-2 (W.W.R.).

[7] (1858) 2 De G. & J. 559, 44 E.R. 1106.

[8] *An Act to Amend the Law of Real Property*, 8 & 9 Vict. c. 106, s. 3.

[9] *Supra*, n. 7 at 570-1, 1111.

[10] (1865) 19 C.B.N.S. 393 at 407-408.

deprive a plaintiff of the remedy he seeks. It would appear that courts are reluctant to give a broad interpretation to words such as "void" or "unenforceable" unless clearly compelled to do so by express words or necessary intendment. The decision of Van Camp J. of the Ontario High Court, in *Caledonia Community Credit Union Ltd.* v. *Haldimand Feed Mill Ltd.*[11] underlines this reluctance. The plaintiff had acted *ultra vires* in making a loan to one of its members. Although the governing statute did not specifically render the contract void, the court held that the contract of loan was void. Even so, Van Camp J. held that the plaintiff could recover the sum it had loaned:[12]

> . . . I adopt the reasoning in *La Caisse Populaire Notre Dame Ltee.* v. *Moyen* (1967), 61 D.L.R. (2d) 118 at 147-8, 59 W.W.R. 129, that it is not open to a defendant who has received consideration on his promise to repay, to assert that the plaintiff-creditor has gone beyond its powers in making the loan. So far as society in general is concerned, its acts are void if it goes beyond its statutory authority but the lender itself can sue, as a promise to repay will be imputed to the borrower who is unjustly enriched. Although the contract might by [sic.] *ultra vires* as one that the lender was not competent to enter into, it may be enforced if it is an account for money lent. It is not competent for the borower [sic.]to allege the want of authority . . .

It is also questionable whether the terms "unenforceable" and "void" adequately convey all the possible shades of illegality. Some courts have created a category of "invalid" contracts which are void and cannot be sued on as contracts, but which give rise to an equitable right to a return of the property parted with, or compensation.[13]

C. The Rule of Non-intervention

While the mere designation of a contract as "void" or "null" or "illegal" in a statute does not, as we have seen, necessarily determine the rights of the parties to a transaction falling within the ambit of the statute, the characterization of a contract or other transaction as "illegal" at common law attracts the general rule both as to "unenforceability" and "non-intervention."

The "non-intervention" aspect of the rule is subject to statutory exceptions. Some statutes stipulate that a contract is valid and enforceable notwithstanding a breach of a statutory obligation. The effect of such a provision is to prevent the characterization of a contract as "illegal."[14]

Other statutes stipulate that a court or other tribunal has jurisdiction to grant relief, on terms or otherwise. We have isolated a number of such provisions in Appendix B to this Report. Of particular interest is section 230 of the *Company Act*,[15] which provides:

> 230. (1) Where any omission, defect, error or irregularity has occurred in the conduct of the business or affairs of a company whereby
> (a) each of a provision of this Act has occurred;
> (b) there has been default in compliance with the memorandum or articles of the company; or
> (c) proceedings at or in connection with any general meeting, class meeting, series meeting, or meeting of the directors of the company, or any assembly purporting to be such a meeting have been rendered ineffective,
> notwithstanding any other provisions of this Act, the court

---

[11] (1974) 45 D.L.R. (3d) 676.

[12] *Ibid.* at 679.

[13] *See, e.g., George White & Sons* v. *Jashansky*, (1917) 34 D.L.R. 271 at 272 (Sask. S.C.); *Trades Hall Co.* v. *Erie Tobacco Co.*, (1916) 29 D.L.R. 779 (Man. C.A.).

[14] *See, e.g.*, the *Consumer Protection Act, 1967*, R.S.B.C. 1979, c. 64, s. 19, reproduced in Appendix B.

[15] R.S.B.C. 1979, c. 59; *see also* the *Credit Union Act*, R.S.B.C. 1979, c. 79, s. 104, and the *Society Act*, R.S.B.C. 1979, c. 390, s. 86.

(d) may, either of its own motion, or on the application of any interested person, make an order to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of the omission, defect, error or irregularity, or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of the omission, defect, error or irregularity, and may give ancillary or consequential directions it considers necessary; but

(e) shall, before making an order, consider its effect on the company and its directors, officers, members and creditors.

(2) No order made under subsection (1) shall prejudice the rights of any third party who has acquired those rights for valuable consideration without notice of the omission, defect, error or irregularity cured by the order.

By this section, the court is given a broad jurisdiction to order the parties to remedy any breach of the Act and to "validate" a transaction notwithstanding the breach. Alternatively, the court may grant such relief to the parties as is appropriate in the circumstances of the case ("negative or modify or cause to be modified the consequences in law of the omission, defect, error or irregularity"). In exercising this jurisdiction, however, the court must consider the effect of a proposed order on the company, its officers, and creditors. In addition, any order made under section 230 does not prejudice the rights of a *bona fide* purchaser for value without notice of the irregularity.

D. The Passing of Title Under an Illegal Contract

Does title pass under an illegal contract? In some respects this question seems sterile. While title to property may be irrelevant when the courts refuse to protect the title of a guilty party, it can in certain circumstances be important. For example, can a third party acquire good title? What happens when the transferor retains possession of the property?

It is well settled at common law that limited property rights will pass under an illegal transaction. In *Taylor* v. *Chester*,[16] the plaintiff deposited half a £50 bank note with the defendant by way of pledge to secure money advanced to the plaintiff to finance the purchase of wine and supplies for her brothel, to be consumed "in a debauch." The plaintiff sought to avoid the general rule by pleading in detinue and bailment and alleging a special property in the bank note. Mellor J. held:[17]

> It would also appear from the case of *Scarfe* v. *Morgan*, per Parke, B., in delivering the judgment of the Court, that, notwithstanding the illegality of the transaction itself, out of which the deposit in this case arose, the lien would exist, because the contract was executed and the special property had passed by the delivery of the half-note to the defendant, and the maxim would apply "in pari delicto potior est conditio possidentis."

It should be noted that when a limited property interest does pass, the law governing the respective rights of the parties is somewhat controversial. In *Bowmakers Ltd.* v. *Barnet Instruments Ltd.*,[18] the plaintiff had let certain machine tools to the defendant on standard hire-purchase terms. The hire-purchase contracts were illegal, being in contravention of certain regulations then in force governing the sale of machine tools. The defendants sold most of the machine tools and refused to return the others. The plaintiffs purported to terminate the agreements and brought an action in detinue and conversion.

The English Court of Appeal held that the action would succeed. The reservation of the plaintiff's title was effective notwithstanding the illegality. Du Parcq L.J. held:[19]

[16] (1869) L.R. 4 Q.B. 309.
[17] *Ibid.* at 315.
[18] [1945] 1 K.B. 65 (C.A.).
[19] *Ibid.* at 71.

> In our opinion, a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim.

In our view, *Bowmakers* is not a case in which the court held that the interest of the lessee was void or unenforceable. As one commentator has pointed out, by reason of the termination of the agreement there remained no enforceable property right vested in the lessee.[20] The lessor therefore could not be met by a defence that any property in the goods remained in the lessee, since the nature of the lessee's property interest was determinable and had been determined without the court's assistance prior to the action being brought. In other words, the fact of the contract being illegal could confer no greater property interest on the defendant than the contract itself purported to create.

Some cases governing leases of land bear out the contention that a conveyance by way of lease is effective to vest the demised premises in a tenant. In *Alexander* v. *Rayson*, the English Court of Appeal *per* Romer L.J. held that:[21]

> In view of these various authorities it seems plain that, if the plaintiff had let the flat to the defendant to be used by her for an illegal purpose, he could not have successfully sued her for the rent, but the leasehold interest in the flat purporting to be granted by the lease would nevertheless have been legally vested in her. The result would have been that the defendant would be entitled to remain in possession of the flat without payment of rent until and unless the plaintiff could eject her without having to rely upon the lease or agreement. This curious aspect of the matter was alluded to by Tindal C.J. in *Gas Light & Coke Co.* v. *Turner*. "It was observed," he said, "in the course of argument for the plaintiffs, that, as they had granted a lease for twenty-one years, such term was vested in the defendant, and that he would be able to hold himself in for the remainder of it without payment of any rent. That point is not now before us; but, without giving any opinion how far the position is maintainable, it is obvious that, if an ejectment should be brought upon the breach of any condition in the lease, the action of ejectment would, at all events, be free from the objection that the Court was lending its aid to *enforce* a contract in violation of law." In the present case the defendant does not, as a matter of fact, desire to remain in possession of the flat. She is, and has for some time been, anxious to leave it. But, if the plaintiff has by his conduct placed himself in the same position in law as though he had let the flat with the intention of its being used for an illegal purpose, he has no one but himself to thank for any loss that he may suffer in consequence.

Alexander v. *Rayson* has been followed in Canada,[22] while the later and inconsistent judgment of the Privy Council in *Singh* v. *Kulubya*[23] has not.

In *Singh* v. *Kulubya* the plaintiff had leased tribal land situate in Uganda to an "Indian." He purported to terminate the lease on the ground that the Land Transfer Ordinance then in force prohibited occupation of such land by non-Africans. Lord Morris held:[24]

> Though the plaintiff did in his plaint claim mesne profits and damages, he later abandoned those claims and at the trial he made no claim for rent or for mesne profits. He was able to rest his claim upon his registered ownership of the property. The defendant did not have and could not show any right to the property. In view of the terms of the legislative provisions he could not assert that he acquired any leasehold interest. For the same reason the defendant could not

---

[20] Brian Coote, *Another Look at Bowmakers* v. *Barnet Instruments*, (1972) 35 Mod. L. Rev. 38 at 49.

[21] [1936] 1 K.B. 169 at 186.

[22] *See, e.g.*, *Walsh* v. *Walsh*, [1948] O.R. 81 (Ont. H.C.).

[23] [1964] A.C. 142 (P.C.).

[24] *Ibid.* at 151-152.

> assert that he had any right to occupy. As a non-African he had no right without the consent in writing of the Governor to occupy or enter into possession of the land or to make any contract to take the land on lease. Quite irrespective of the circumstance that the plaintiff by giving certain notices to quit had purported to withdraw any permission to occupy, the defendant was not and never had been in lawful occupation.
>
> The defendant, for his part, could not point to or rely upon the illegal agreements as justifying any right or claim to remain in possession, and without doing so he could not defeat the plaintiff's claim to possession. In so far as the plaintiff may have thought that in the circumstances it was reasonable to give the defendant notices to quit he could give such notices without their being related to or dependent upon the unlawful agreements. Because the agreements were unlawful no leasehold interest vested in the defendant. He had no right to hold over or to hold from year to year. His occupation of the land was contrary to law.

The conflict between the *Kulubya* case and *Alexander* v. *Rayson* is probably more apparent than real. *Kulubya* is a very unusual case, since the vesting of any property right would defeat the express purpose of the statute. It may be doubted whether *Kulubya* can be regarded as any more than an example of a specific overriding of the position that title does pass under an illegal contract in order to further the object of the enactment. *Kulubya* is, moreover, unsatisfactory insofar as the Privy Council did not deal with counsel's argument that the Privy Council in *Singh* v. *Ali*[25] had determined that in fact title to a truck did pass to the purchaser notwithstanding the illegality of the contract.

In Halsbury it is asserted that, in England, it is settled that where property has been transferred absolutely under an illegal contract, such transfer is effective to pass title in the property to the transferee.[26] Reference is made in that context to *Singh* v. *Ali*. In that case, the defendant bought a truck on the plaintiff's behalf and delivered it to him pursuant to an illegal scheme to deceive the licensing authorities. The defendant later retook possession of the truck. Lord Denning held that notwithstanding the illegality of the contract, the fact that it had been fully executed and carried out meant that the property had passed to the plaintiff:[27]

> . . . the transferee [plaintiff], having obtained the property, can assert his title to it against all the world, not because he has any merit of his own, but because there is no one who can assert a better title to it.

This principle was also held to apply even where the transferee has not taken possession of the property, so long as the title to it was intended under the contract to pass to him. In *Belvoir Finance Co.* v. *Stapleton*,[28] the plaintiff bought cars from dealers and let them on hire purchase to a car-leasing company. Both of these transactions were illegal under the *Hire-Purchase and Credit Sale Agreements (Control) Order*,[29] but the plaintiff was allowed to recover damages for conversion from the defendant, an employee of the car-leasing company, who had wrongfully sold one of the cars to an innocent purchaser. Although the plaintiffs had never taken possession, they acquired good title to the cars.[30]

The position in Canada is rendered considerably more confused by the decision of the Supreme Court of Canada in *Clark* v. *Hagar*,[31] which is occasionally cited for the proposition that title does not pass under an illegal

---

[25] [1960] A.C. 167, [1960] 2 W.L.R. 180, [1960] 1 All E.R. 269 (P.C.) cited with approval in *Schentag* v. *Gauthier*, (1972) 27 D.L.R. (3d) 710 (Sask. D.C.).

[26] 9 Hals', 4th ed., para. 434; *see also* J.W. Wade, *Legal Status of Property Transferred Under an Illegal Contract* (1940) 41 Ill. L. Rev. 487.

[27] *Supra*, n. 25 at 176-7 (A.C.).

[28] [1971] 1 Q.B. 210 (C.A.).

[29] 1964, Art. 1, Sch. 2, Pt. 1, para. 3.

[30] *See also Belvoir Finance Co.* v. *Harold G. Cole, Ltd.*, [1969] 2 All E.R. 904 (Q.B.).

[31] (1894) 22 S.C.R. 510 (S.C.C.).

contract. However, on a closer examination, it may be doubted whether any such sweeping rule was in fact established by that case.

Hagar sold a house to one Jennie O'Neil, known to her to be a prostitute. A mortgage back to Hagar was given by O'Neill, who subsequently sold the house to Clark by way of a deed in which Clark covenanted, *inter alia*, to pay off the Hagar mortgage. Hagar eventually commenced a foreclosure action against O'Neil and Clark. Judgment was initially given to Hagar when Clark failed to appear at the hearing. Clark then applied for, and obtained an order setting aside the judgment and for a trial of the issue of whether any part of the consideration for the mortgage represented the goodwill of the immoral business conducted in the house, and which accordingly rendered the mortgage illegal and unenforceable.

At the trial of the issue the trial judge concluded that although Hagar had herself run a house of ill-repute on the site, that at most she knew of, but did not share, the "wicked intent" of O'Neil to continue to run a house of ill-repute. He therefore concluded that the contract was not illegal, since no part of the consideration related to the illegal activity. Even assuming the sale of the house was illegal, however, Street J. held:[32]

> There can be no doubt that a person who parts with a limited estate only in a parcel of land for a purpose which is immoral or illegal, while he may be unable to compel a reconveyance and may be unable to recover the purchase money, is not punished by any forfeiture of the rights which belong to the portion of the estate which he retains. If he should convey land upon an illegal contract, he can neither recover the land nor the purchase money: if he should let land for an illegal purpose he can not recover rent for it, but, at the expiration of the lease, he can recover possession; and if he sells land upon an illegal consideration, although he may not be able to sue for the purchase money, yet retaining the legal estate he has the rights which appertain to it.

He concluded:[33]

> In the present case the plaintiff is seeking to recover possession of that which was undoubtedly hers down to the date of the contract, and only became partially the property of the other party to the contract by means of the transaction which the defendants charge to be immoral.

In other words, the deed and mortgage were effective to vest an equity of redemption in O'Neil and the legal estate in Hagar, even if the transaction was characterized as illegal.

Although the Chancery Division overruled the trial judge,[34] his judgment was affirmed by the Ontario Court of Appeal,[35] which was in no doubt at all that title to the land passed by virtue of the impugned deed and mortgage back to Hagar. Counsel argued both that the deed and mortgage were effective to pass title, and secondly that if they were not, Clark must nevertheless fail because his title could be no better than O'Neil's, and if hers fell, so did his.[36] This argument was accepted by Maclennan J.A. who held:[37]

> A conveyance of land, or a transfer of goods, may be made without any consideration, or for an illegal or immoral consideration. The absence or illegality of consideration does not prevent the title of the land, or the property in the goods, from passing; and so the mortgage deed in question passed the legal title to the land comprised therein to the plaintiff, and the plaintiff's legal title is complete. If it were not so, and if the immoral consideration made the transaction wholly inoperative and void, then it applies equally to the deed as to the mortgage, and if the mortgage is void, so is the deed, and the plaintiff's original title, which is admitted and is indisputable, remains, and she is entitled to recover the land.

---

[32] (1892) 21 O.R. 27 (Ch. D.) *per* Street J. at 31-32 *sub nom. Hager* v. *O'Neil et al.*

[33] *Ibid.* at 33.

[34] *Sub nom Hager* v. *O'Neil et al.*, (1893) 20 O.A.R. 198.

[35] *Ibid.* at 210 *et seq.*

[36] *Ibid.* at 213.

[37] *Ibid.* at 218-219.

It was this judgment which the Supreme Court of Canada upheld in *Clark* v. *Hagar*.[38] It must first be noted that Gwynne J.'s judgment in the Supreme Court of Canada is difficult to construe. However, on a close reading of the judgment, Gwynne J. never directly addresses the issue of title passing under an illegal contract. Instead he merely notes that it was the argument of the appellant that the deed and estate conveyed by the mortgage were void. This argument failed. The court recognized the flaw in the appellant's argument on this point which the Court of Appeal also noted—that is that Clark's own title rested on the same "immoral transaction."

The following passage from Gwynne, J.'s judgment is usually the one cited for the proposition that title does not pass under an illegal contract:[39]

> Upon an action being instituted by the mortgagee to foreclose this mortgage he sets up by way of defence and for the purpose of evading payment of the money secured by the mortgage that the consideration for the execution of the mortgage was illegal and immoral and that the mortgage therefore is void and of no effect. Now the deed executed by the mortgagee conveying the property in fee simple to the mortgagor constituted the consideration for the execution of the mortgage. If then the consideration for the execution of the mortgage was illegal and immoral and the mortgage therefore void, the deed and the estate thereby conveyed which constituted that consideration must be null and void; yet the appellant's argument before us was to the effect that his succeeding in establishing the mortgage to be void for the reason suggested would be to vest in him the land which he had purchased expressly subject to the mortgage discharged from the mortgage. The case therefore may truly he said to be one *sui generis* and without parallel in the reported cases.

It is clear that the statement that the "estate" was "void" is merely a recitation of the appellant's argument and not a statement of principle. In fact, Gwynne J. goes on to expressly note the appellant's contention would be to vest the estate in Clark, a case "without parallel in the reported cases." Even if the statement is regarded as something more than a mere recitation of the appellant's argument, it is at best *obiter dicta*, since the appeal was rejected on grounds that had nothing to do with the passing of title, viz:

1. Clark could not take advantage of "illegality" in a contract to which he was not a party.[40]
2. Clark could not rely on illegality generally since he had been granted a trial only on the issue of whether the consideration for the mortgage included the goodwill of the immoral business, an issue on which he had failed at trial.[41]

---

[38] *Supra*, n. 31.

[39] *Ibid.* at 526-527.

[40] *Ibid.* at 527-528.

In *Holman* v. *Johnson* Lord Mansfield lays down the principle upon which the court proceeds in respect of contracts that are immoral and illegal. As between the parties to the illegal contract he says:

> The objection that a contract is immoral and illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of public policy which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say, the principle of public policy is *ex dolo malo non oritur actio*.

Now, here it is to be observed: 1st. That the language is applied as between the immediate parties to the illegal or immoral contract, who, in the case of such a contract, are *in pari delicto*, and the test as to the plaintiff's right of recovery where such a defence is set up by the other party to the contract is whether the plaintiff is or is not *in pari delicto* with the defendant. It does, I must say, seem to me to be an unwarranted extension of the rule so laid down by Lord Mansfield, not supported by any decided case, to apply it to the case of a mortgagee seeking to foreclose a mortgage given to secure purchase money of land sold by the mortgagee, against a *bona fide* purchaser for valuable consideration from the original vendee, whose deed of conveyance from such vendee subjects the premises and the estate therein transferred to such purchaser, in express terms, to payment of the mortgage and the moneys secured thereby.

[41] *Ibid.* at 530-531.

The plea of the appellant which merely alleged that the consideration for the execution of the mortgage in the statement of claim mentioned was illegal and immoral was a bad plea as presenting no facts relied upon as constituting illegality or immorality. It is true that the plaintiff did not take any objection to the plea for this defect, but when after a regular judgment of foreclosure in favour of the plaintiff in the action the appellant applied to the court for a special indulgence to be granted to him, namely, that the regular judgment should be set aside and a new trial given to him to enable him to prove

3. On the authorities, the trial judge was permitted to refuse to draw an inference that Hagar knew of O'Neill's wicked intent merely because Hagar knew O'Neil be a prostitute.[42]

It should also be noted that in summing up his position,Gwynne J. made no reference to any rule that title does not pass under an illegal contract. Instead he merely noted that an instrument executed for the purpose of passing title was, "void and incapable of being enforced" without adverting to the question of title.[43]

Ontario courts have reviewed the question of title passing under an illegal contract on other occasions. In *Coplan* v. *Coplan*,[44] Schroeder J.A. *per curia* held that title to shares passed under a transfer of shares executed in blank for the purpose of deceiving Revenue Canada. As he noted in his judgment:[45]

> There is a marked distinction between an action in which it is sought to enforce an illegal agreement and one in which the plaintiff asserts a right to property already acquired under such an agreement.

Schroeder J.A. then went on to cite with approval the judgment of McClennan J.A. referred to earlier,[46] and held that not only were the holders of the blank share certificate to be regarded as having legal title to the shares notwithstanding the proven illegality of the arrangement, but also that the court should order the defendant company to register the plaintiffs as owners. The case is therefore even stronger than *Clark* v. *Hagar*.[47]

In considering the proper interpretation to be placed on *Clark* v. *Hagar*, the decision of the Supreme Court of Canada in *Elford* v. *Elford*[48] cannot be ignored. In that case, a husband transferred land to his wife in order to evade his creditors. He held a general power of attorney from her, which after a quarrel, he used to have the property re-registered in his name. It was held that this action constituted a fraud upon the power. Notwithstanding that the wife's own title arose out of an illegal transaction, Duff J. held:[49]

> . . . it is equally clear that the wife is entitled to assert her rights as owner, that is to say the rights incidental to her ownership against the husband as well as against a stranger . . .

The authorities would accordingly appear to favour the view that title will pass under an illegal transaction, although that approach has not received universal approbation.[50] It has been noted that these cases depend to some

---

that $2,000 of the purchase money for the house sold by the plaintiff to the mortgagor, and for securing which the mortgage was given, was for what has been called the goodwill of the house, or a value attached to it as a house of ill-fame, and that the residue of the purchase money or $2,000 was the agreed value of the premises irrespective of such so called goodwill, and when he accepted the new trial upon condition of paying the balance of the money remaining due upon the security of the mortgage and availed himself of the special indulgence so granted to him, and went down to try the truth of the allegation as to the $2,000—part of the purchase money—and wholly failed to establish the matter alleged in respect thereof, no principle of law or public policy requires the court to entertain a further objection made *ore tenus*, not set out in the record, namely, that in the evidence offered to establish the contention to try which alone the appellant was granted the indulgence of setting aside a regular judgment, and in which he failed, it sufficiently appeared that the person to whom the house was sold by the plaintiff, and by purchase from whom the appellant claims, was to the knowledge of the plaintiff a prostitute, and that the plaintiff knew or had reason to know or believe that the purchaser of the house intended when the house should be conveyed to her to continue to lead therein her dissolute and immoral life. Whether these facts, assuming them to be established, would or would not make void the mortgage given to secure part of the purchase money *bona fide* agreed upon as being the fair marketable value of the house, I can see no principle of law or public policy requiring the court to relax the rules of law governing the mode of presenting a defence of that kind to an action upon a mortgage given for such purchase money for the purpose of permitting the appellant, after judgment against him upon the point upon which alone the court granted the new trial, to raise such new contention.

[42] *Ibid.* at 532-540.

[43] *Ibid.* at 540-541.

[44] [1958] O.R. 551, 14 D.L.R. (2d) 426 (Ont. C.A.).

[45] *Ibid.* at 433 (D.L.R.).

[46] *Supra*, n. 37.

[47] *Coplan* v. *Coplan*, was cited with approval by Hughes J. in *Weatherspoon et al* v. *Canadian Pacific et al*. (1979) 22 O.R. 385 (Ont. H.C.) at 535 *et seq*., affirmed (1982) 129 D.L.R. (3d) (Ont. C.A.).

[48] (1927) 64 S.C.R. 125, 69 D.L.R. 284, [1922] 3 W.W.R. 339.

[49] *Ibid.* at 129 (S.C.R.).

[50] *See, e.g.*, Cheshire & Fifoot, *The Law of Contract* (8th ed. 1972) at 336-337, M.J. Higgins, *The Transfer of Property Under Illegal Transactions*, (1962) 25 Mod. L. Rev. 149.

extent upon the exception to the general rule respecting the pleading of an illegal contract.[51] If a contract is fully executed, title, and in most cases possession, will have passed. The transferor seeking restitution will be compelled to seek the avoidance of an illegal contract as the foundation of any remedy he may seek, and will for that reason, be obliged to refer to the contract in his pleadings.

[51] Klippert, *Unjust Enrichment* at 349-350

CHAPTER VII THE NEED FOR REFORM

A. Generally

1. Introduction

The need for reform of the law governing illegal transactions is generally acknowledged. Both the Contracts and Commercial Law Reform Committee of New Zealand[1] ("the New Zealand Committee") and the Law Reform Committee of South Australia[2] were agreed that the law relating to illegal contracts was in need of reform. Many judges and academics have argued the case for reform. We are also of the view that reform is required.

The general rule evolved at a time when the volume of legislation was considerably smaller than at present. Modern society is governed by a profusion of statutes, regulations and bylaws promulgated by many different legislative and administrative bodies. Modern contracts are much more likely to run afoul of legislation than similar arrangements in the 18th century. It is no longer reasonable to assume either that businessmen or the public will be aware of all restrictions on their right to contract freely, or that the restrictions themselves are matters of common sense.

Moreover, the nature of much of the legislation has changed. Can it be said that every plaintiff who seeks the assistance of a court and who is also in breach of a statute has "polluted hands"? J. Shand argues:[3]

> What must be conceded is that the growth of often amoral penal legislation in the present century has brought to a head this central problem of public policy — namely, whether the court is to penalize a criminal by refusing to enforce rights which he would have enjoyed apart from his crime. Whereas most offences at common law were such as to offend against the moral standards of society, or certainly of the judges, many breaches of modern penal statutes will not do so. Thus doubtless Mansfield's reference to "the transgression of a positive law of this country" to a new concern with "public morality." Where the "polluted hands" justification for applying public policy falls to the ground, however, is the irrelevance of moral culpability to its operation.

The plaintiff in *Kingshott* v. *Brunskill*,[4] who, without any intent to act unlawfully, committed a technical breach of a marketing statute by selling ungraded apples to another producer, is not in the same position as a contract killer attempting to recover his fee for service or a highwayman seeking to recover the proceeds of crime from his accomplice. The recognition that it is possible in the course of creating or performing a contract to break some statute or regulation without necessarily being "criminal" calls into question a rule created at a time when the intrusion of the legislature into a citizen's day-to-day life was not the commonplace it is today.

2. An Evaluation of the Policy Grounds Advanced in Support of the General Rule

The grounds most often advanced in support of the general rule are canvassed by Professor J.W. Wade in an article aptly titled "Benefits Obtained Under Illegal Transactions—Reasons For and Against Allowing Restitution."[5] In this section we shall briefly canvass the major points made by Professor Wade, to which we will add a few observations of our own.

---

[1] *Report on Illegal Contracts*, 1969

[2] *37th Report Relating to the Doctrines of Frustration and Illegality in the Law of Contract*, 1977

[3] J. Shand, *Unblinkering the Unruly Horse: Public Policy in the Law of Contract*, (1972) 30 Camb. L.J. 144

[4] [1953] O.W.N. 133 (C.A.)

[5] (1946) 25 Texas L. Rev. 31

(a) The Courts Should not Assist in Enforcing the Illegal Contract

Although such a rationale would apply where damages are claimed for loss of expected profits, the same cannot be said where a plaintiff seeks either the recovery of damages in respect of expenses incurred and payments made pursuant to the contract or the return of property transferred under the unlawful arrangement. In the latter case, the plaintiff, far from asserting a right to claim under a contract, expressly affirms that it is at an end. He does not seek to enforce the contract. The court's assistance is sought merely to assist the parties in extricating themselves from the bargain. It is true that courts may do justice in some cases, provided the plaintiff has a *locus poenitentiae*. This exception is only a partial answer to the hardship which ensues from the draconian consequences of applying the general rule. Its limits are unclear. Moreover, since it is restricted to cases where the transaction is substantially incomplete, the result is to deprive the parties of the court's assistance where a claim is substantial, but not where it is trivial.

(b) Punishment

It is sometimes said that the courts should refuse to enforce illegal transactions to "punish" wrongdoers. Once again, this rationale may be overstated, and, even if "punishment" is a valid rationale, we doubt whether it should justify depriving innocent as well as culpable persons of any remedy.

Denying a civil action to punish a "wrongdoer" causes us some concern. Where a contract is illegal, in the sense of being contrary to public policy as synthesized from common law cases, should the parties to a contract be characterized as "wrongdoers?" The contract is generally characterized as illegal because of its effect, not because of the conduct of the parties. Where the formation of the contract, or its performance in a stipulated fashion, is forbidden by statute or regulation, what degree of "punishment" is required? Where the statute stipulates for punishment, on what ground should the courts impose harsher penalties? Where no punishment is stipulated, then should the court supply the omission? Professor Wade noted:[6]

> The amount of loss the plaintiff suffers is measured by what he has given in carrying out an illegal contract and bears no necessary relation to the degree of moral turpitude involved in making the contract. Moreover, though the defendant is equally guilty, or more so because of his attempted fraud on the plaintiff, he incurs no punishment, in fact, application of the rule benefits him to the extent that he is allowed to keep ill-gotten money or property.

The general rule is a very blunt instrument indeed. If the punishment fits the crime, it is purely fortuitous.

(c) Deterrence

J. Shand explained this rationale as follows:[7]

> The justification for applying the traditional principles of public policy most favoured today appears to be deterrence. If the court declines to enforce rights brought into existence by criminal conduct, the argument runs, this will deter the litigant from acting criminally in the first place. Closely associated is the argument that to enforce illegal contracts or tainted rights would be to encourage crime.

We find this rationale unconvincing. First, a criminal, undeterred by the punishment specified in a statute, is unlikely to be deterred by the remote possibility that if the illegal transaction falls through he will have no contractual remedy. Such an argument presupposes, for example, that the crimi-

---

[6] *Ibid.* at 96.

[7] *Supra*, n. 3 at 152-153.

nal knows enough of the criminal law and the law of contracts to form the opinion that the general rule applies to his case.

Second, the general rule extends beyond "crime" to breaches of regulatory and morally neutral legislation. Deterrence in that context is not of sufficient weight to justify the harsh consequences of the rule.

Third, the denial of relief in the courts does not necessarily mean that the parties will not seek extra-curial, and perhaps illegal, means of enforcement. Alternatively, it may induce others to perform their illegal undertakings in order to recoup their investment.

Finally, the deterrence rationale is clearly inapplicable where the offence has been committed, or where the court creates or extends a head of public policy. In the former case, deterrence of the parties is irrelevant. In the latter case, the only party who may be deterred is one who has a sufficient grasp of the law respecting illegal contracts that he might predict the creation or modification of a rule of public policy.

(d) The Plaintiff Has "Polluted Hands"

The argument that certain plaintiffs are unfit to be heard in the courts was apparently first expressed in *Collins* v. *Blantern*, by Lord Chief Justice Wilmot:[8]

> You shall not stipulate for iniquity. All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again, you shall not have a right of action when you come into a Court of Justice in this unclean manner to recover it back. *Procul O! Procul este profani!*

Although this passage has been said to sound "more like an epithet than a reason,"[9] it has been cited numerous times. Taken to its logical conclusion, no prostitute, mobster, tax evader, parking violator or other person guilty of an offence or immoral conduct could ever approach the court.

We are persuaded that in general the mere fact of wrongdoing, without more, should not necessarily preclude relief. If there are other policy grounds which impel such a conclusion, then the court may wish to deny relief. However, the phrase "polluted hands" is merely another way of saying that contracts contrary to public policy should not be enforced. We are fortified in this conclusion by several cases in which the defendant's hands were as polluted, if not more, than those of the plaintiff. For example, in *Mountain Village Developments Ltd.* v. *Engineered Homes Ltd.*,[10] the defendant purchaser was held not bound by a contract to purchase a lot in a planned subdivision because the plaintiff had failed to file a prospectus as required by the *Real Estate Act*,[11] section 62. Catliff L.J.S.C. stated:[12]

> My decision is not of course intended to reflect favourably on the conduct of the defendant. It appears to have committed a plain breach of contract and is only able to avoid the consequences by invoking s. 62 of the Act. As the defendant knew perfectly well that the plaintiff was prepared to file a prospectus if necessary, little can be said in its favour. The defendant is a major Canadian company whose participation in the development was of considerable consequence to the plaintiff. The defendant's withdrawal from the development as a co-developer will be a significant loss to the plaintiff. In the circumstances the defendant appears to have acted shabbily. If I had been able to construe s. 50 as permitting the subsequent filing of a prospectus I would willingly have done so.

---

[8] (1767) 2 Wils. K.B. 347 at 350, 95 E.R. 80 at 852.

[9] Leflar, *Contribution and Indemnity Between Tortfeasors* (1932) 81 U. of Pa. L. Rev. 130 at 134.

[10] (1983) 44 B.C.L.R. 287 (B.C.S.C.).

[11] R.S.B.C. 1979, c. 356 (since amended, S.B.C. 1981, c. 28, s. 22).

[12] *Supra*, n. 10 at 295.

3. The Need for Reform

(a) The Current Law Leads to Unjust Enrichment

This point cannot be controverted, and no proponent of the general rule has argued otherwise. As Lord Mansfield noted in *Holman* v. *Johnson*:[13]

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say.

The denial of relief with the consequent unjust enrichment of the defendant may be justified where the plaintiff is culpable and deliberately sought to perpetrate a crime. As Professor Wade notes:[14]

> Undoubtedly there is merit in the argument that a plaintiff should have no relief upon a bad claim, but its merit depends upon proper application. It must appear not only that the claim is connected with an illegal transaction but also that relief should be refused because of the nature of the particular object sought. A suit for enforcement of an illegal contract should be rejected, and the same may be true where the plaintiff seeks a profit from the transaction. But a claim seeking to repudiate and undo the transaction is essentially of a different order. Relief cannot then properly be denied because of any bad nature of the demand, and the argument must be applied with discrimination to claims for restitution.

The "proper application" of the general rule advocated by Professor Wade would involve a more sophisticated approach to the equities of the plaintiff's claim, and not merely an arbitrary application of the general rule. The general rule itself is not completely without merit, but arbitrarily applied it can lead to injustice.

(b) The Current Law is Technical and Uncertain

Canadian courts are in the main unhappy with the absolute nature of the general rule. As a result, a number of exceptions have been judicially created which are difficult to reconcile with the main policy grounds advanced in support of the general rule. For example, if the main justification for the rule is the need to punish and deter, then it is difficult to see how the exceptions respecting *locus poenitentiae* and cases where the plaintiff may advance a claim if he need not refer to the illegal contract enhance the general rule's deterrent effect. If denying access to those with polluted hands is the real reason, why permit severance of offending clauses? The plaintiff's hands are still polluted.

The current law does not necessarily discourage suits on illegal contracts. It merely makes them more complex. Moreover, subsequent glosses on the general rule deflect the courts from considering questions such as whether the effect of the contract is contrary to public policy and whether the plaintiff is a culpable wrongdoer to technical questions of pleading (must the plaintiff plead the illegal contract?), of substantive law (is the contract executory?), of philosophy (who is at fault?) or of construction (is severance possible?). The merits of the case are secondary considerations, at best. Moreover, even were the ambit of the exceptions to the general rule certain, the nature of this process is objectionable. It is preferable that the issues involved in granting or denying relief be reviewed objectively and forthrightly. The current law is in disarray and, perforce, complex.

---

[13] (1775) Cowp. 341 at 343, 98 E.R. 1120 at 1121.

[14] *Supra*, n. 5 at 44.

B. Options for Reform

1. Judicial Reform

Two recently published Canadian textbooks deal with the question of illegality as it relates to the developing law of Restitution. In their book *Restitution*, Fridman and McLeod suggest that the exceptions to the general rule should not be regarded as anomalous exercises of judicial intervention, but rather as specific instances of the process of weighing together the public policy in issue with the judicial policy against unjust enrichment.[15] In his book *Unjust Enrichment*, G.B. Klippert takes an even more robust view in suggesting that the acceptance of the principle of unjust enrichment into Canadian law has opened the door to a judicial re-evaluation of the current law governing illegal contracts.[16]

We do not quarrel with either of these views, coinciding as they do with opinions expressed in a similar context in an earlier report concerning Benefits Conferred Under a Mistake of Law.[17] The possibility of judicial, as opposed to legislative, reform cannot be dismissed. It may be argued that the interests of reform can best be served by declining to recommend legislative reform, in the hope or expectation that judicial reform will occur in due course.

We must state at the outset our conclusion that awaiting judicial reform is not a practical alternative. The process of judicial reform is, at best, haphazard. The elements leading to a pronounced change of judicial direction depend upon a happy coincidence of counsel, judges, facts and resources.

The facts of the case in which reform is argued must be conducive to reform. Few counsel, for example, would argue for a reform of the law based on unjust enrichment if the result of the application of that principle would be adverse to their client, if the case is one which, on past authority, is favourable to their client, or if the public policy involved would in any event override the judicial policy against unjust enrichment. Counsel must also be aware of the possibility of arguing for a change in the law.Not all counsel are equally at home with the theoretical or practical application of the principle of unjust enrichment.

The judges before whom the plea for reform is argued must be willing to consider such arguments and to strike out boldly in new directions. The current law respecting illegal transactions has been affirmed in the Supreme Court of Canada and in the trial and appellate courts of every province. It is likely therefore that it would take at least one appeal to the Supreme Court of Canada to effect any permanent change in the current law.

Even assuming that the case is an appropriate one in other respects, one cannot lose sight of the costs to the litigants involved in mounting a direct assault on the current law governing illegal transactions, as well as the costs to other litigants who are not in a position to challenge the current law and who must therefore await the fortuitous appearance of a case affirming the primacy of the judicial policy against unjust enrichment.

Given that a proper case may emerge in which an argument may be advanced for a judicial reform, (and we know of no such case at present) there is no guarantee that the adoption of unjust enrichment as the guiding principle will necessarily result. The current law is well entrenched and considerable confusion respecting the current law may well be the result of any attempt at judicial reform. The recent decision of the Supreme Court of Canada in *Hydro*

[15] Carswell, 1982 at 306

[16] Butterworth's, 1983 at 350 *et seq*

[17] L.R.C. 51 (1981)

Electric Commission of Nepean v. *Ontario Hydro*[18] amply bears out our contention. The Supreme Court of Canada, by a majority, affirmed the continuing force and effect of the general rule prohibiting recovery of money paid under a mistake of law, noting that counsel for the appellant had not sought to argue for its abolition. The process of judicial reform is likely to be slow, costly, and to require more than one case in which to establish the limits of recovery.

Lastly, even were the Supreme Court of Canada to accept the overriding nature of the principle of unjust enrichment, our review of legislative reform enacted elsewhere in the Commonwealth illustrates that there is scope for reform which, although it recognizes the principle of unjust enrichment, provides for the exercise by a court of even more flexible powers in order to do justice between parties to an illegal transaction. A court revising the current law solely on the principle of unjust enrichment would be hard pressed to base on the law of restitution, the exercise of powers such as we shall recommend.

2. Remove the Bar Prohibiting Relief

The Contract (Malay States) Ordinance of 1950 provides that when an agreement is, or becomes void:

> . . . any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

The effect of this provision is to reverse the second head of the general rule. It does not make a contract enforceable which would otherwise be unenforceable. Instead it is addressed solely to the question of the potential unjust enrichment which may ensue from the invalidation of a contract.

In a review of Working Paper No. 38 (Illegal Contracts) by Waddams, it was suggested that the reform of the law governing illegal transactions would best be affected by a "modest approach" similar to that adopted in the Contract (Malay States) Ordinance:[19]

> Wherever a contract is unenforceable for reasons of public policy (statutory or otherwise) the court shall have power to grant such relief as appears just, and not contrary to public policy.

We have given consideration to the possibility of recommending the enactment of legislation based on this suggestion, and, with the greatest respect, we find ourselves unable to endorse this proposal. There are a number of important questions with which this suggestion does not deal. It would apply, for example, only to "contracts" and not to non-contractual transactions. Not all transactions to which the general rule applies are termed "unenforceable," and indeed research indicates not only that there is no academic or judicial consensus respecting the use of words like "void" and "unenforceable," but also considerable variation in the legislative formulae used to invalidate contracts. We are concerned that our recommendations satisfactorily define the relationship between a general grant of discretionary power and current legislation invalidating contracts. The suggested recommendation does not satisfactorily define that relationship.

We are also firmly of the view that the retention of the current law as contemplated by the suggested recommendation is undesirable. Lastly, all our other correspondents in commenting on Working Paper No. 38 either endorsed, or raised no objection to, our suggestion that it was appropriate that legislation set out some guidelines to the exercise of judicial discretion contemplated by our proposals.

[18] (1982) 132 D.L.R. (3d) 193, 41 N.R. 1, 16 B.L.R. 215 (S.C.C.).

[19] (1983) 7 Can. Bus. L.J. 361 at 365.

3. A Discretionary Power

Other Commonwealth law reform agencies which have considered the question of illegal contracts have settled on a scheme which vests in courts a discretion to depart from the strictures of the general rule when necessary in the interests of justice. In New Zealand and South Australia, reports have been issued which propose legislative reform of this nature.[20] In New Zealand, the *Illegal Contracts Act* of 1970 was enacted along the lines suggested by the Contracts and Commercial Law Reform Committee. The text of this Act is set out as Appendix C to this Report.

Support for this approach may be found in existing provincial legislation. Earlier in this Report several British Columbia statutes (for example, the *Company Act*, *Credit Union Act*, and *Society Act*) are noted which permit the court to readjust relations between parties to an arrangement which violates the terms of those Acts, and in general to "[modify] the consequences in law of the omission, defect, error, or irregularity." The contract in issue continues to be unenforceable unless the court, for good reason, orders otherwise. The legislation adopted in New Zealand and recommended for South Australia has a common characteristic with the British Columbia legislation permitting courts to modify the consequences in law of an illegality. In all three cases, the general rule is preserved intact insofar as it bars an action based on the illegal contract. The general rule continues *prima facie* to govern the position of the parties, but the court has the discretion to relieve the parties from the consequences of illegality in an appropriate case.

We are attracted by this approach. Courts should have the jurisdiction to decline to enforce an illegal contract or to refuse a restitutionary remedy to a rogue. The court should not be obliged to grant relief merely because the rogue falls within an exception to the general rule, or to decline to grant relief in cases where the policy of a statute has not been infringed by the contract if the parties do not fall within an exception to the general rule. When declining to grant relief would not serve a useful purpose, courts should possess some discretion to depart from the general rule.

In Canada, general legislation along similar lines was proposed in a recent article, in which Leon Trakman concluded:[21]

> This article suggests that the most suitable judicial approach towards the effects of illegality lies in two complementary directions: firstly, in the recognition that judicial discretion is necessary to the development of just law; and secondly, in tethering this discretion by combining intrinsic common law controls with the needs of each contractual situation.

The general rule, to the extent it is preserved by legislation such as that in New Zealand is an intrinsic common law control. However, in view of the rationales underpinning the general rule, a question is raised *ab initio* whether there is any utility in retaining such a control, or whether reforming legislation should abandon the general rule entirely. This question is particularly acute in view of the volume of modern regulatory legislation which is essentially amoral, and whose impact on contracts is considerable.

We have concluded that the general rule does perform a useful function. While the case for deterrence can be overstated, the general rule has some deterrent effect. This deterrent effect will be enhanced by recommendations made later in this Report, which are designed to prevent reliance upon the common law exceptions to the general rule. A plaintiff or defendant would no longer be able to rely on an exception to the rule and thereby attempt to avoid judicial scrutiny of his role in the transaction.

---

[20] *Supra*, notes 1 and 2

[21] (1977) 55 Can. B. Rev. 625 at 655.

Similarly, although the notion that no plaintiff with "polluted hands" should touch "the clear springs of justice" strikes may be outdated, the law should be responsive to public attitudes, and given the large amount of public money underwriting the judicial system, it is right that transactions involving attempts to act in a fashion contrary to public policy should be *prima facie* unenforceable. While a potential litigant should not be punished in a civil proceeding, neither should the courts be compelled to adjudicate a dispute between highwaymen.

Of the three options for reform discussed, we have concluded that the appropriate vehicle for reform is legislation vesting in a court a discretionary power to deviate in an appropriate case from the result dictated by the application of the general rule.

This conclusion rests in part on the generally favourable reaction to the New Zealand *Illegal Contracts Act*, 1970. One New Zealand correspondent wrote:

> The Illegal Contract Act has worked well in New Zealand. Indeed I think it would be the general view in the profession that it is one of the best of the statutory interventions in contract in this country.

In Working Paper No. 38 a legislative scheme which preserved the general rule to govern the initial position of the parties was proposed. The proposals went on to define the nature of the discretion to depart from the general rule, the manner in which it should be exercised, and the nature of the transaction to which it should be applied. With few exceptions, our correspondents approved of the thrust of the legislative reform proposed, while offering comments on how the proposals could be improved.

The Commission recommends that:

1. Legislation be enacted to reform the law governing illegal transactions.

2. The general rule should continue to apply to illegal transactions, subject to the exercise by a court of a discretionary power under such legislation to grant relief from the consequences of illegality.

This recommendation outlines the nature of reform legislation in the broadest of strokes. In the following chapter, we shall examine the nature of this discretion and its application to cases involving illegal transactions, and will develop further recommendations intended to ensure that the exercise of this discretion by courts will be consistent and principled.

CHAPTER VIII A POWER TO GRANT RELIEF

A. Introduction

In this chapter we define the manner in which the judicial discretion recommended should be applied. Our review of the current law and other reform proposals has permitted the isolation of a number of questions concerning a power to modify the consequences in law flowing from the application of the general rule:

1. What should be the relationship between the judicial power to grant relief and the present law?
2. To which transactions should the power be applied?
3. What remedies should a tribunal have the jurisdiction to grant?
4. What should the effect of illegality be?
5. Which tribunals should possess the power to grant relief?
6. Should the power be applied retrospectively?

These questions will be examined in the balance of this chapter.

From time to time in this chapter reference will be made to the recommendations for reform contained in this Report, collectively, as an "*Illegal Transaction Act*." This term is used for convenience only, and should not be taken to imply that our preferred method of implementing our recommendations is by a separate Act. It would, for example, be possible to incorporate our recommendations into a "*Vitiated Transactions Act*" which might include legislation such as the *Fraudulent Conveyance Act* and the *Frustrated Contract Act*. This is a matter we are content to leave in the hands of Legislative Counsel.

B. The Relationship Between an Illegal Transaction Act and the Present Law

1. Should the Present Exceptions and Qualifications to the General Rule be Preserved?

Working Paper No. 38 addressed this question in its examination of subsection 7 (7) of the New Zealand *Illegal Contracts Act*. That subsection provides:

> (7) Subject to the express provisions of any other enactment, no Court shall, in respect of any illegal contract, grant relief to any person otherwise than in accordance with the provisions of this Act.

The effect of this subsection is to preclude reliance on any exception or qualification to the general rule which has developed under the present law by a party to an illegal contract. This was the position endorsed in Working Paper No. 38.

Our correspondents were divided on the question of whether parties to an illegal transaction should be prevented from relying on a common law exception to the general rule which might have been invoked in the absence of reforming legislation. In addition, the South Australian Law Reform Committee concluded that the power to grant relief should be in addition to any common law remedy.[1]

The arguments in favour of retaining rights to relief available at common law turn on the discretionary nature of the legislative remedy proposed. It may be argued that it is unfair that a plaintiff who would, under the present law, fail

[1] 37th Report of the Law Reform Committee of South Australia, 1977 at 25–27. This Report considered in some detail the *Illegal Contracts Act, 1970* and the Report of the New Zealand Contracts and Commercial Law Reform Committee in which it was based. For a general critique of the New Zealand legislation, *see* R. J. Sutton, *Illegal Contracts Act*, [1972] Recent Law (N.S) (Feb.—Apr.)

squarely within an exception to the general rule, and hence be entitled to relief as of right, should be obliged instead to invoke a discretionary remedy. Moreover, retaining the present law would ensure that the plaintiff would not be in a worse position under reforming legislation than he would have occupied at common law. Lastly, it may be argued that retaining the common law is more flexible, since it preserves existing remedies which would function independently of the judicial power to grant relief.

Nevertheless, the arguments in favour of precluding reliance on the current law seem stronger. Any benefits which flow from retaining the current law would be outweighed by the resulting confusion and possibility of inconsistent results. One of the objections which can be made to the operation of the current law is its tendency to focus inquiry on questions of pleading, extraneous substantive law, philosophy or technical rules of construction rather than the merits of the case. Retaining the current law would continue to require courts to consider these questions, rather than the actual merits of the action. The common law is unduly illogical and complicated. Moreover, as noted in the review of the current law, the present law is capricious in its results. A rogue, or a party who has acted in bad faith, may as easily be benefitted by the application of an exception to the general rule as a person with a meritorious claim.[2]

Legislation such as that enacted in New Zealand is intended to implement a rational and uniform scheme for dealing with the effect of illegality. The court is empowered to deal fully with the respective positions and merits of each party. By contrast, exceptions such as the "locus poenitentiae," and artificial rules governing the pleading of illegality, do not appear to be founded on any coherent or consistently applied ground of public policy. Much of the beneficial effect of reforming legislation would therefore be lost if the court is obliged to grant a remedy when it would be unjust to do so merely because the plaintiff falls within an exception to the general rule. It may very well be that the result of excluding the common law is that on occasion plaintiffs who would undoubtedly have succeeded at common law are instead dependent upon the exercise of judicial discretion. The "fairness" or "unfairness" of being required to persuade a judge that on the merits of the case granting a remedy is warranted depends upon whether at common law the exception or rule on which reliance would have been placed had a tendency to mask the illegal or improper behaviour of the plaintiff. Retaining the common law is fundamentally inconsistent with a discretionary power to grant relief.

It would, of course, be possible to provide that a court may decline to grant relief at common law if to do so would be unjust. This, however, involves inviting the court to exercise a discretion against granting relief. It is much simpler to merely abolish any reference to the common law and permit a court to proceed directly to the merits of the case. Moreover, the "flexibility" of the common law may be overstated. The common law is "flexible" only in the sense that there exists a sufficient state of confusion that a court can, if pressed, arrive at a fair result in some cases by the use of artificial technical devices and ill-defined exceptions.

We adhere to the conclusion expressed in Working Paper No. 38 that any relief from the consequences of an illegal transaction should be granted only under the terms of an *Illegal Transaction Act*.

---

[2] *See, e.g., Elford* v. *Elford*, (1922) 64 S.C.R. 125, 69 D.L.R. 284, [1922] 3 W.W.R. 379 (S.C.C.); Rogers & Leonard, (1973) 39 D.L.R. (3d) 208 (Ont. H.C.); *Mountain Village Developments Ltd.* v. *Engineered Homes Ltd.*, (1983) 44 B.C.L.R. 287 (B.C.S.C.).

The Commission recommends that:

3. In a proceeding between parties involved in an illegal transaction, no relief should be granted by a court in respect of an illegal transaction or any property affected by it, except as provided by the Illegal Transaction Act.

2. The Relationship Between an Illegal Transaction Act and Other Legislation

(a) When Should Specific Legislation Override an Illegal Transaction Act?

Subsection 7 (7) of the New Zealand Act specifies that

> . . . subject to the express provisions of any other enactment no court shall, in respect of any illegal contract, grant relief to any person otherwise than in accordance with the provisions of the [Illegal Contracts] *Act*.

In *Harding* v. *Coburn*,[3] the New Zealand Court of Appeal held that under this subsection mere words invalidating a contract were not "express provisions to the contrary," unless a grant of relief under the *Illegal Contracts Act* (1970) would be obviously inconsistent with the object of the legislation in issue.

Subsection 7 (1) of the *Illegal Contracts Act* (1970) also limits the court's power to grant relief from the consequences of illegality by providing that the exercise of the court's discretion is "subject to the express provisions of any other enactment." The effect of these words is debatable. They appear to leave open an argument that certain forms of words have the effect of displacing the New Zealand *Illegal Contracts Act*. If all that was intended by these words is that the legislature may specifically exclude the New Zealand *Illegal Contracts Act*, it is difficult to determine why they were included. If the intent was broader, the question arises whether a section providing that a contract is "void" would displace the Act. As noted in Chapter VI, many different forms of words are used in British Columbia statutes to invalidate contracts, and it is difficult to gauge the extent to which each different form would be effective to exclude a British Columbia *Illegal Transaction Act* if a similar qualification were adopted.

This qualification has been the source of some controversy in New Zealand. In *Slobbe* v. *Combined Taxis Co-Operative Society Ltd.*,[4] an unregistered moneylender sought to recover money advanced in breach of the *Moneylenders Act 1908*. At trial, the view was expressed that:[5]

> . . . the power given by s. 7 (1) is "subject to the express provisions of any other enactment." The enactment relevant here is, of course, the *Moneylenders Act 1908* and its amendments. If that Act expressly declared a contract of the kind here in issue to be illegal or void the words just quoted would, in my opinion, preclude the court from exercising the power given by s. 7 (1) to grant relief by way of validating it.

The Court of Appeal did not, on its view of the case, find it necessary to express a "concluded view" on this *obiter dicta*.

In *Dresden* v. *Fletcher Development Co. Ltd.*,[6] however, this point was directly in issue, and McMullin J. declined to follow the *dicta* in *Slobbe*. Under the *Land Settlement Promotion and Land Acquisition Act 1952*, the contract in issue was deemed to be "unlawful and of no effect." It was contended that these words rendered the *Illegal Contracts Act* inapplicable. In rejecting that contention McMullin J. held:[7]

---

[3] [1976] 2 N.Z.L.R. 304.
[4] [1973] 2 N.Z.L.R. 650 (C.A.); (1973) 8 Recent Law (N.S.) 227.
[5] *Ibid.* at 652 (N.Z.L.R.).
[6] (1974) 2 N.Z.L.R. 11 (S.C.); (1974) 9 Recent Law (N.S.) at 38 (N.Z.L.R.).
[7] *Ibid.* at 19 (N.Z.L.R.).

> With respect, it seems to me, however, that if the words "subject to the express provisions of any other enactment" where used in s. 7 of the *Illegal Contract Act* are given the meaning for which Mr. Dugdale contends as excluding, in the present case, the application of s. 7 of the *Illegal Contracts Act*, that statute could never have any application to a statute which has declared a transaction to be unlawful and of no effect. If this were so the remedial effects of the *Illegal Contracts Act* would be largely lost and, indeed, s. 7 would have application only to those contracts which are illegal at common law.
>
> . . . Nor do I think that the words "and of no effect" preclude the operation of the *Illegal Contracts Act 1970*. While these words are not surplusage and effect must be given to them — *Joe* v. *Young* (*supra*) — I cannot see any reason why they should prevent the defendant from praying in aid s. 7 of the *Illegal Contracts Act*. Indeed, the *Illegal Contracts Act* specifically contemplates the granting of relief to contracts which but for that enactment would be "of no effect." Section 6 provides that every illegal contract shall be "of no effect" and s. 7 provides that, notwithstanding the express provisions of s. 6, the court may grant relief in the case of an illegal contract, *inter alia*, by its validation in whole or in part. In my respectful opinion, the words "subject to the express provisions of any other enactment" in s. 7 of the *Illegal Contracts Act* do no more than recognize the right of the Legislature in the enactment of a *particular* statute as being without remedy so as to preclude the invocation of the benevolence of s. 7, but they do not otherwise prevent its application unless there is a specific direction to the contrary.

In the result, it seems that in New Zealand the words "subject to the express provisions of any other enactment" apply only when the *Illegal Contracts Act* is specifically excluded by name, where it is specifically provided that, notwithstanding any legislation to the contrary, no relief is to be granted, or, perhaps, where the statute itself specifically sets out a scheme for relief in terms inconsistent with the *Illegal Contracts Act*.

Although any ambiguity in the words "subject to the express provisions of any other enactment" appear to have been eliminated in New Zealand by judicial interpretation, we nevertheless are of the view that adopting similar wording in an *Illegal Transaction Act* would be unsatisfactory. Appendix A to this Report sets out a survey of the legislative language employed in provincial and federal enactments to invalidate contracts. Language as imprecise as that employed in New Zealand would involve for every different formulation an inquiry into whether the words used are sufficiently "express" to preclude any grant of relief under an *Illegal Transaction Act*. Since the use of any particular formula appears to be arbitrary, such an inquiry seems pointless.

New Zealand case law has not dealt with an application for relief under the *Illegal Contracts Act* in which the invalidating legislation itself provides for some form of relief from the consequences of illegality. Such a legislative conflict is, however, a distinct possibility in British Columbia. Appendix B to this Report sets out a number of statutes which specifically empower a court to grant relief from an illegal contract. There is little reason to compel the parties to apply to a court under an *Illegal Transaction Act* if the enactment which renders the contract invalid specifically permits relief to be given.

On the other hand, should a court be permitted under an *Illegal Transaction Act* to supplement any relief available under the invalidating legislation? We have concluded that where the Legislature has specifically addressed the question of the extent to which the consequences of illegality should be modified in the very enactment which gives rise to the illegality, it is inappropriate to permit a court to exercise any jurisdiction under an *Illegal Transaction Act* to vary that legislative scheme.

As some of our correspondents pointed out, a legislative scheme contained in invalidating legislation may not be as comprehensive or flexible as an

Illegal Transaction Act. An examination of the enactments in which the Legislature has addressed itself to the question of granting relief when a transaction has been invalidated leads to a conclusion that this objection is not, at present, a practical one. Even if it were the case that specific legislation provided remedies less generous than those available under an *Illegal Transaction Act*, we would still be of the opinion that the court should not be given the power to override the legislative scheme for adjusting rights *inter partes* adopted by the Legislature. Notwithstanding the form of invalidating legislation, an *Illegal Transaction Act* should apply unless legislation, be it the *Illegal Transaction Act* or the invalidating legislation itself, specifically states otherwise, or if the legislation in issue contains a scheme for adjusting the rights of persons affected by it.

The Commission recommends that:

4. *Courts should have power to grant relief under an* Illegal Transaction Act *unless:*

(a) an enactment expressly provides that the Illegal Transaction Act *does not apply, or*

(b) the enactment under which the illegality arises provides for relief from the consequences of illegality.

(b) To What Types of Legislation Should an Illegal Transaction Act Apply?

Questions involving transactions rendered invalid by reason of legislation may arise not only by reason of enactments passed by provincial or federal legislatures, but also by reason of prohibitions contained in regulations, statutory instruments, bylaws and the like. Should an *Illegal Transaction Act* contain a definition of legislation extending to all these forms of legislative intervention? There appears to be no reason to exclude any form of legislation from an *Illegal Transaction Act*.

Both federal and provincial *Interpretation Acts* provide workable definitions of "enactment" which may also serve in an *Illegal Transaction Act*. The *Interpretation Act* (B.C.)[8] defines both "Act" and "Enactment" as follows:

> "Act" means an Act of the Legislature, whether referred to as a statute, code or by any other name, and, when referring to past legislation, includes an ordinance or proclamation made prior to 1871, and having the force of law.
>
> "enactment" means an Act or a regulation or a portion of an Act or regulation.

"Regulation" is defined as follows:

> "regulation" means a regulation, order, rule, tariff of costs or fees, proclamation, letters patent, commission, warrant, bylaw or other instrument enacted
>
> (a) in execution of a power conferred under an Act, or
>
> (b) by or under the authority of the Lieutenant Governor in Council,
>
> but does not include an order of a court made in the course of an action or an order made by a public officer or administrative tribunal in a dispute between 2 or more persons;

Similarly, the *Interpretation Act* (Canada) states in section 2:[9]

> "Act" means an Act of the Parliament of Canada,
>
> "enactment" means an Act or regulation or any portion of an Act or regulation,
>
> "regulation" includes an order, regulation, order in council, order prescribing regulations, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument made or established

---

[8] R.S.B.C. 1979, c. 206, s. 1.

[9] R.S.C. 1970, c. I-23, s. 2. This section defines "enactment" for the purposes of the *Interpretation Act* only. Cf. s. 28 which contains no general definition of "enactment".

(a) in the execution of a power conferred by or under the authority of an Act, or

(b) by or under the authority of the Governor in Council;

The adoption of these definitions of "enactment" would, in effect, permit a subordinate body with legislative or rule-making functions to exclude an *Illegal Transaction Act* either expressly, or by providing for an alternative scheme for relief. Such a power may, for example, extend to a municipality. To the extent that any subordinate body has the power to affect the civil consequences of breaching a regulation, by-law or the like, Recommendation 4 requires that body to expressly address the effect of invalidating a contract. In such a case, we are content that the body so charged determine for itself whether the application of the *Illegal Transaction Act*, or some other scheme for relief, best serves its purposes.

Another policy question arises in considering the definition of "enactment." Should provincial legislation govern the consequences of illegality arising out of a federal enactment, and is the Legislature competent to do so? A survey of federal enactments persuades us that the possibility of unjust results is as great a concern as with provincial legislation. The possibility does exist that granting of some form of relief may, at first blush, not be consonant with the objects of a federal legislative scheme. Real conflicts, however, will be minimal. If the granting of relief would disrupt a federal statutory purpose, it is unlikely that a court would grant relief. There appears to be no policy which impels the exclusion of federal enactments, if that is constitutionally permissible.

As a matter of constitutional law, extending the operation of provincial illegal transaction legislation to federal enactments should not be objectionable in the vast majority of cases. A starting point is the proposition that illegal transaction legislation is essentially a matter of property and civil rights within the province, and hence is a matter within provincial jurisdiction. On the other hand, federal power to invalidate contracts rests in the main on that invalidation being necessarily incidental to the legislative scheme in issue, although it is also possible that some independent head of federal power may be involved.

An *Illegal Transaction Act* is merely an extension of the court's present power (in exceptional circumstances) to grant relief from the effects of an illegal transaction. In cases of this kind, the mere fact that a court exercising a provincial jurisdiction may affect a subject matter reserved to the Parliament of Canada does not render the provincial legislation *ultra vires*. This proposition was affirmed by the Supreme Court of Canada in the case of *Attorney General for Ontario* v. *Barfried Enterprises Ltd.*[10] in which Cartwright J. held:[11]

> The *Unconscionable Transactions Relief Act* appears to me to be legislation in relation to Property and Civil Rights in the Province and the Administration of Justice in the Province, rather than legislation in relation to Interest. Its primary purpose and effect are to enlarge the equitable jurisdiction to give relief against harsh and unconscionable bargains which the courts have long exercised; it affects, but only incidentally, the subject-matter of Interest specified in head 19 of s. 91 of the *British North America Act*. For this reason and for the reasons given by my brother Judson, I agree with his conclusion that *The Unconscionable Transactions Relief Act* is not *ultra vires* of the Legislature of Ontario.

This case, we believe, governs the legislation recommended in this Report.

In any event, it will be rare for any constitutional case to arise, since it will require three pre-conditions: the federal statute must on its true con-

[10] [1963] S.C.R. 570 (S.C.C.).

[11] *Ibid.* at 579-80.

struction prohibit any judicial intervention; properly construed, the federal prohibition must be a valid exercise of federal power; and the case must be one in which it is appropriate to grant relief. Even where these three conditions coincide, the most likely result will be a finding that in the circumstances of that case the federal legislation will prevail as being paramount.[12]

To summarize, it does not appear to be *ultra vires* the provincial legislature to enact legislation governing the consequences of invalidity by a federal enactment. The only real possibility for constitutional conflict would arise if on its true construction federal legislation prohibits judicial intervention. In such a case the possible paramountcy of federal legislation does not seem to be a strong argument for refusing to extend reforming legislation to cases in which a finding of illegality is based on a federal enactment.

The Commission recommends that:

5. *(a) An* Illegal Transaction Act *should apply to "enactments."*
   (b) "Enactment" should be defined to mean "enactment" as defined in the Interpretation Acts of British Columbia and Canada.

C. The Application of an Illegal Transaction Act

1 "Contract," "Transaction" and "Property"

As noted in Chapter II of this Report, although the general rule has been developed primarily in the field of contract law, it applies equally to a wide variety of arrangements which are not classified under our law as contracts. It is also possible to distinguish a "contract" from the deed, conveyance, or other document used to effect a transfer of property. Since the general rule applies not only to a contract, but also to any subsidiary document necessary to implement its terms, it is important that the Act be framed in such a manner that it applies to both aspects of a contractual transaction.

In Working Paper No. 38, it was tentatively concluded that the proposals should extend to informal arrangements not falling within the ambit of the word "contract." The application of reforming legislation should not depend upon characterizing the arrangement in issue as a "contract." Since our goal was to bring all the potential cases to which the general rule applies within reforming legislation, we concluded that definition of "contract" should be broadly framed to include any arrangement, disposition or conveyance of property, or any property which had been, or may be transferred under a contract or an arrangement.

Extending a scheme for relief to non-contractual "transactions" or "arrangements" goes beyond recommendations made for reform in other jurisdictions, which have considered the general rule only in its contractual context. It may, for that reason, be argued that there is no precedent for such an extension, and that it creates definitional problems. The novelty of extending legislative reform to non-contractual transactions is not in itself reason to refuse to implement a broader reform. Research indicates that the application of the general rule to cases of trusts, gifts, and other transactions may lead to unjust results. The problems raised by such "transactions" are amenable to reform paralleling that which applies to illegal contracts.

There is also ample justification for extending an *Illegal Transaction Act* to "arrangements" or "transactions" which do not fall easily within any

[12] *Attorney General of Canada v. Attorney General of British Columbia (Re Fisheries Act 1914)*, [1929] 3 W.W.R. 449, [1931] D.L.R. 194 (P.C.).

recognized category of legal relationship. Adopting a broad term such as "transaction" imports into reforming legislation some flexibility which will permit the court to grant relief in appropriate cases without first being obliged to characterize the dealings of the parties as a trust, contract, power, or the like. Moreover, the word "transaction" bears the *imprimatur* of the Supreme Court of Canada. In *Canada Cement La Farge Ltd. et al* v. *British Columbia Lightweight Aggregate Ltd.*,[13] Estey J. would have dismissed the plaintiff's claim had it been proven that the loss it suffered resulted from its participation in a combine to which it was not a party. He characterized the dealings between the parties as "transactions."[14] Legislation intended to ameliorate the harsh effects of the general rule should take into account its application in any case, whatever the nature of the dealings between the parties. For that reason we have settled on "transactions" as a word of sufficiently broad import for that purpose.

The Commission recommends that:

6. *(a) An* Illegal Transaction Act *should apply to "transactions."*
   (b) "Transaction" should be defined to include any
      (i) contract, trust, power or other arrangement, or provision thereof, and
      (ii) transfer, conveyance, deed, or other disposition of property.

Another problem identified earlier concerning the operation of the general rule is the random and often capricious manner in which rights to possession of, and title to, property is determined. Later in this Report recommendations are made concerning the power of a tribunal to adjust property rights under an illegal transaction. For that reason, it is necessary to stipulate that property is also to be given an expansive definition, so that the *Illegal Transaction Act* will apply in respect of any claim involving property rights transferred pursuant to an illegal transaction. In particular, the Act should be drafted in such a manner that no party to an illegal transaction who has obtained property under the terms of the illegal transaction would be able to avoid the application of the *Illegal Transaction Act* by relying on some inherent property right he has acquired or retained.

The Commission recommends that:

7. *(a) An* Illegal Transaction Act *should also apply to "property."*
   (b) "Property" be defined to include money, or any type of obligation, power, right, interest or thing, which has been or is to be transferred, or which is otherwise affected by an illegal transaction.

2. Illegal Transactions

The question of whether the term "illegal transaction" should be defined in an *Illegal Transaction Act*, and if so what the definition should be, generated a considerable amount of controversy, both within the Commission and among our correspondents. In Working Paper No. 38, the following proposal was made:

> 4 (1) "Illegal contract" be defined for the purposes of the Act as any contract or arrangement:
>
> (a) which violates, or has a tendency to promote the violation of public policy,

---

[13] (1983) 24 C.C.L.T. 111 (S.C.C.).
[14] *Ibid.* at 131.

(b) whose formation or performance is prohibited by enactment,
(c) whose performance in a foreign jurisdiction violates the law of that jurisdiction,
(d) which is contrary to, or has a tendency to bring about a result contrary to the policy of the law or of an enactment either in its formation or performance,
(e) which is specifically provided in an enactment to be null, void, illegal, unlawful, invalid, unenforceable or otherwise ineffective, or in respect of which no action or proceeding may be brought, or
(f) which is otherwise illegal at law or in equity.

The proposal, *inter alia*, provided that "contract" was to be defined to include non-contractual transactions. The definition incorporated the results of research into the question of the sources of illegality, and for that reason is quite detailed.

The importance of carefully defining the term "illegal contract" or "illegal transaction" is readily apparent. That term would control the ambit of reforming legislation. Moreover, the efficacy of our proposals intended to preclude reliance on the current law depends on a definition of "illegal transaction" framed in such a manner that no case to which the general rule applies would fall without the proposed legislation, and hence be governed by the common law. In addition, a precise definition of "illegal transaction" would avoid much of the confusion and uncertainty which has dogged both the common law, and the cases dealing with the New Zealand *Illegal Contracts Act*.

The New Zealand legislation does not contain an extensive definition of "illegal contract." It provides in section 3:

> *"Illegal contract" defined* — subject to section 5 of this Act, for the purposes of this Act the term "illegal contract" means any contract that is illegal at law or in equity, whether the illegality arises from the creation or performance of the contract; and includes a contract which contains an illegal provision, whether that provision is severable or not.

Earlier in this Report, doubts were expressed concerning the use of the term "illegal contract." Those doubts are shared by a number of commentators, who have pointed out that the definition of "illegal contract" may not be broad enough to catch all transactions which might be subject to the general rule.

In a recent article, M.P. Furmston pointed out another defect in the definition contained in section 3:[15]

> . . . [it] is clearly evasive since it seeks to incorporate by reference the whole of the existing law as to what contracts are illegal. It is also defective since, *pace* the Report, there is no clear or uniform judicial usage as to which defective contracts are "illegal." Although there is authority for the view that not all illegal contracts are equally illegal, it is not clear precisely how many levels of impropriety there are, nor which contracts should be placed at which level. More important for the present purpose, it is not clear whether it is wrong to use the appellation "illegal" of contracts in the least improper category.

Furmston concluded that there was room for argument "as to the status of other defective contracts either at common law or equity." These doubts are shared by D.P. Harris and A. Zuckerman:[16]

> . . . there are two situations at least where it is possible that the Act does not apply because there is no "illegal contract": that where one party is debarred from enforcement by reason of his illegal motives at the time of contracting but the other is not, and that where one party alone is similarly debarred by reason of an illegality committed in the course of performance.

---

[15] *The Illegal Contracts Act, 1970—An English View*, (1972) 5 N.Z. Univ. L. Rev. 151 at 159.
[16] [1971] A.S.C.L. 613 at 639.

Doubts concerning the wisdom of section 3 were shared by the South Australian Committee. They commented:[17]

> We would suggest the following alterations to the definition. We think the word "formation" is the proper word to be used in relation to a contract rather than the word "creation." The definition does not include a contract which is illegal because the parties to it intend to use the contract to effect an illegal purpose. We are not sure whether the words "or performance" are apt to cover two different types of illegality: (a) performance which is prohibited *per se* by the common law or by statute and (b) performance which contains an element of illegal conduct sufficient to taint the contract. We think that it would be better to set out the various ways in which illegality may affect a contract in several subprovisions to cover these points. In addition, as we have said, usage — and possibly also the law provides that certain contracts are in truth void rather than illegal and there should be a further subclause to say that "illegal contract" for this purpose includes a contract which is void as being in restraint of trade, in derogation or ouster of the jurisdiction of the courts or which operates so as to take away or derogate from the interdependent rights and liabilities of husband and wife or parent and child.

Some of the comment received from our correspondents reinforces our dissatisfaction with the New Zealand definition and underlines the problems raised by commentators on the New Zealand legislation. The key to relief under the New Zealand legislation is a finding of "illegality." As Waddams noted in reviewing Working Paper No. 38:[18]

> Indeed there must be few long term contracts in modern times in which some sort of illegality does not occur in the course of performance. Under the present law such contacts are not illegal, but only (in some cases) unenforceable at the suit of the party intending illegal performance.

Waddams, as have other commentators, therefore draws a distinction between "illegal" and "unenforceable." In our view, both types of invalidity should attract the operation of an *Illegal Transaction Act*, whose operation should not depend upon the form of words used in the past by courts, or upon the somewhat arbitrary formulations used in provincial or federal legislation to invalidate a transaction. The confusion which has led commentators to conclude that there are many different "shades" of illegality is something which reforming legislation should address.

There appears to be only one reported case in which a New Zealand court has had to decide whether a contract falls within section 3. In *R.D. Bull Ltd.* v. *Broadlands Rentals*,[19] Chilwell J. made a number of observations. He noted that the Act applied to contracts in the technical sense, and not to mere "arrangements." He then went on to hold that in considering the case at bar, it was open to the court to look upon three separate transactions as one "contract." Since one of the transactions was contrary to the *Economic Stabilisation Act, 1948*, the whole contract was contrary to law, would traditionally have been classified as illegal, and was therefore caught by the *Illegal Contracts Act*. One may infer from this judgment that if Chilwell J. had felt compelled to classify the contract as one which traditionally would not have been characterized as "illegal," relief could not have been granted under the Act. The result is that rather than precluding reference to the old law respecting illegal contracts, the Act requires the plaintiff to show that the contract is "illegal" at common law.

Chilwell J.'s observation also highlights a further defect in the New Zealand legislation. It applies only to contracts. The word "contract" used as a term of art implies, at the very least, offer, acceptance and consideration. Although the court was able to extend the meaning of "contract" in the *R.D.*

[17] *Supra*, n. 1 at 24.
[18] (1983) 7 Can. Bus. L.J. 361 at 362.
[19] [1975] 1 N.Z.L.R. 304 (S.C.).

Bull Ltd. case, it is doubtful whether it would be possible to extend it to all illegal transactions (and particularly to trusts) notwithstanding that the general rule may apply equally to such cases.

The New Zealand definition of "illegal contract" is unsatisfactory. In particular, it preserves arguments that there exist apart from illegality, lesser or greater shades of invalidity to which the Act would not apply. Moreover, it does not recognize the wide variety of *formulae* used to invalidate transactions in legislation in force in British Columbia.

Although it is clear that the New Zealand definition of "illegal contract" is unsatisfactory, the question of what the definition should be is one of some difficulty. In Cyprus, section 23 of the *Contract Law* provides:[20]

> The consideration or object of an agreement is lawful, unless —
>
> (a) it is forbidden by law; or
>
> (b) is of such a nature that, if permitted, it would defeat the provisions of any law; or
>
> (c) is fraudulent; or
>
> (d) involves or implies injury to the person or property of another; or
>
> (e) the Court regards it as immoral, or opposed to public policy.
>
> In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

This definition merely sets out a number of categories of cases involving illegality. In contrast, the proposed definition of "illegal contract" contained in Working Paper No. 38, adopted a third method of defining "illegal contract." The proposal, which is set out above, defines "illegal contract" with reference to the factors which cause a contract to be characterized as "illegal." To that extent, the definition was declarative of the current law. It did not expand the concept of "illegal contract" except to the extent that reference to the various statutory formulae used to invalidate a contract would sweep any invalidated contract within the reform legislation we proposed regardless of the "degree" of illegality involved.

The question of how and whether "illegal contract" was to be defined was one of the matters most vigorously debated by our correspondents. All of our correspondents agreed that the proposed definition was comprehensive. Rather, debate centered on whether any definition is required, and if so, whether the proposed definition was unduly complex.

We cannot agree with those of our correspondents who were of the view that it was unnecessary to define "illegal contract" beyond affirming that the meaning of that term at common law is to govern. At common law, a great deal of confusion surrounds the question of when a transaction can be characterized as "illegal." There may, moreover, be many different degrees of invalidity, of which "illegality" is merely one. In particular, the following concerns have led to the conclusion that some definition is required:

1. A definition turning solely on "illegality" gives rise to a vexing problem of characterization. Are all contracts which violate public policy "illegal"? Some commentators draw distinctions between "null," "void," "illegal" and other terms.
2. It is imperative to impose some regularity in the result of statutory illegality. As Appendix A illustrates, many statutory formulae other than the mere word "illegal" are used in both provincial and federal enactments. All these instances of statutory illegality should be brought within the Act.

---

[20] C. 149, Laws of Cyprus, *supra*, n. 16. This provision has been applied in dismissing an action brought on a promissory note given to secure an amount owing under an illegal contract, *Tornari & Co. v. Savva*, (1974) 3 J.S.C. 389 (Famagusta District Court). *See also Kanaris v. Tassian*, (1969) 1 C.L.R. 637.

3. Some definition of the types of contract to which an Illegal Transaction Act applies is necessary, if only to define the ambit of the Act.

Nevertheless, on reviewing the definition of "illegal contract" contained in proposal 4 (1) in Working Paper No. 38, we have concluded that although ideally an *Illegal Transaction Act* should contain a comprehensive definition such as we have proposed, as a practical matter, a simpler definition may be possible. To the extent that the proposal was declarative of the current law, the definition of "illegal contract" could refer solely to "illegality" at common law or in equity. At the same time, it is imperative to underline in the definition that any transaction which is invalidated in any manner is subject to the remedial provisions of an *Illegal Transaction Act*.

A definition based on Working Paper Proposal 4 (1) (e) would be appropriate to carry out these objectives, modified to take into account "illegality" at common law. Since contracts are regarded as "void" or "unenforceable" at common law or in equity for reasons unconnected with illegality, (e.g., uncertainty, want of consideration, laches, undue influence) the reference to "illegality" at common law should refer to the operation of public policy. The reference to "public policy" would require courts to define public policy on a case by case basis, as they do under the current law.

A definition of "illegal transaction" should also specifically refer to the *performance* of an illegal contract. Later in this Report we shall discuss the meaning to be given to "performance" under an *Illegal Transaction Act*.

The Commission recommends that:

8. "Illegal transaction" should be defined for the purposes of an Illegal Transaction Act *as any transaction which is null, void, illegal, unlawful, invalid, unenforceable, or otherwise ineffective, or in respect of which no action or proceeding may be brought by reason of:*

(a) an enactment or a provision in an enactment, or

(b) a rule of the common law or equity, relating to public policy, governing the formation, existence or performance of the transaction.

3. Transactions Invalidated by an Enactment

(a) Interpretation

The effect of Recommendation 8 will be to bring within an *Illegal Transaction Act* any transaction in any manner invalidated by an enactment. The definition is, however, silent on the question of whether any form of words is in fact effective to invalidate a particular transaction. As noted earlier in this Report,[21] common law courts have formulated a benevolent rule of construction used in determining whether the object of an enactment requires a court to find a contract to be illegal. Its genesis is the judgment of Devlin J. in the *St. John Shipping Corporation* v. *Joseph Rank Ltd.* case.[22]

In New Zealand, the *Illegal Contracts Act* incorporates this benevolent rule of construction. Section 5 of that Act provides:

> *Breach of enactment* — A contract lawfully entered into shall not become illegal or unenforceable by any party by reason of the fact that its performance is in breach of any enactment, unless the enactment expressly so provides or its object clearly so requires.

The New Zealand Contracts and Commercial Law Reform Committee, in its Report on Illegal Contracts, justified including section 5 as follows:[23]

---

[21] *Supra*, Chapter III

[22] [1957] 1 Q.B. 267

[23] 1969 at 8

> Contracts expressly prohibited ought not to present any difficulties of categorization. The trouble comes when the question is whether a prohibition should be implied. On this matter there is authority for two different kinds of approach. Under the one, in any case where the contract requires the performance of an illegal act, or where an illegal act is committed by a party in the course of performance, the contract will be illegal and the guilty party, or sometimes both parties, will be unable to enforce it. An example would be the approach of the New Zealand courts to the effect of breach of section 25 of the *Land Settlement Promotion and Land Acquisition Act 1952*, prior to the decision of the Court of Appeal in *Joe* v. *Young* [1964] N.Z.L.R. 24. Under the other approach, the requirement or commission of any illegal act does not of itself determine the fate of the contract. The statute, regulation or bylaw must still be construed to see whether its policy and purpose clearly require that breach should affect the legality of contracts. Examples of this approach are *St. John Shipping Corporation* v. *Joseph Rank Ltd. (supra)* and the New South Wales case, *Haves* v. *Cable* (1961) 62 S.R. (N.S.W.) 1. It is perhaps fair to say that the second approach has gained greater favour with judges overseas than with those in this country.
>
> The consequences of illegality being what they are, we believe they ought not unnecessarily to be visited on the parties to any contract. Accordingly, we recommend in clause 5 of our draft statute what in effect would be an adoption of the second approach in this country.

The South Australian Committee agreed that section 5 was declarative of the current law and approved a similar section in a proposed South Australian Act.[24]

The wording of section 5 recasts the test suggested by Devlin J. in a manner which avoids the criticism of his judgment leveled by E. K. Teh, which was discussed earlier in this Report.[25] Nevertheless, the South Australian Committee suggested a change in wording:[26]

> If the amendment is to be made then we suggest that the second and third lines be redrafted to read:
>
> "shall not be deemed to be illegal or unenforceable by any party by reason of the fact that its performance is or has been in breach . . ."

In Working Paper No. 38, the enactment of a similar provision was proposed:[27]

> A contract or arrangement should not be illegal by reason that its formation or performance has a tendency to bring about a result contrary to the policy of an enactment, unless the object of the enactment clearly so requires.

Since Devlin J.'s benevolent rule of interpretation seems to be law in British Columbia, it is not strictly necessary to expressly incorporate this legislative test into an *Illegal Transaction Act*. However, in view of the definition of "illegal transaction" recommended in this Report, it is appropriate to emphasize that it is not the intent of the legislation in adopting an expansive definition to alter in any way judicial attitudes towards statutory illegality.

The *St. John Shipping* case was a case of illegal performance, and hence, strictly speaking, the benevolent rule applies only to performance and not to the formation of a transaction. Legislation enacting the rule should apply equally to the formation of a transaction.

Our preference for a less complex definition of "illegal transaction" means that there is no longer any virtue in retaining concepts such as "tendency" or the "policy of an enacment." It is therefore possible to move closer to the New Zealand and South Australian formulations. At the same time, there is no need to refer to express illegality as these formulations do.

---

[24] *Supra*, n. 1

[25] *Supra*, Chapter III

[26] *Supra*, n. 1

[27] At 86

There is one other problem with section 5 of the New Zealand Act. It refers only to "breach of an enactment" and would, therefore, be useful in cases in which the court was obliged to consider whether an enactment which provides a penalty for a breach of its terms also requires the invalidation of a contract. The *St. John Shipping* case, however, did not involve a contract entered into in breach of an enactment. The argument respecting illegality turned on the object of the enactment in question, and whether carrying out that object required the court to regard the contract as illegal. Devlin J. was therefore faced with a case of implied illegality, to which the benevolent rule of interpretation should also extend.

The Commission recommends that:

9. *An* Illegal Transaction Act *should provide that a transaction not be regarded as an illegal transaction by reason that its formation or performance is in breach of an enactment, or contrary to the object of an enactment, unless the object of the enactment clearly so requires.*

(b) "Performance"

Recommendations 8 and 9 refer to a transaction whose "performance" is in breach of an enactment. A question therefore arises concerning the meaning to be given to "performance." Earlier in this Report[28] we noted that the effect on a transaction of illegality in its performance varied. If the contract stipulates for an illegal mode of performance, then the knowledge of the parties to the contract respecting its illegality is irrelevant; the contract attracts the operation of the general rule. If no particular mode of performance is required and the actual performance is illegal, or if one party chooses to perform the contract in an illegal fashion not stipulated by the contract, then the contract is nevertheless enforceable by the "innocent" party, unless he had knowledge of the "wicked intent" to perform illegally, and is unenforceable by the guilty party.

In Working Paper No. 38, it was proposed that "performance" include all three meanings of the word. Hence the proposed legislation would have applied, even though under the current law, an action brought by an innocent party would not be classified as an action to enforce an "illegal" contract and hence would not be one to which the general rule applied. A question may be raised respecting the utility of extending the general rule in this context to cases in which under the current law it would not apply.

Where a case of intended illegal performance is in issue, it is a question of fact in each case whether the innocent party knew of the unlawful intent. The jurisdiction of the court under an *Illegal Transaction Act* should not turn on that fact. If a party is genuinely "innocent," then the wide variety of relief available under our proposals would give a court ample tools to prevent any injustice to him. On the other hand, the party who intended to perform illegally, or who did so, may have acted without any knowledge of the illegality of his action. In such a case, it may be doubted whether the "innocent" party should be entitled to relief merely because he is "innocent." That may be a very important factor in the court's decision to grant relief. It should not be the only one. We have concluded that "performance" as used in an *Illegal Transaction Act* should be specifically defined to include the actual or intended performance of obligations under a transaction by any person involved in it, so as to preclude any jurisdictional argument based on the "innocence" of the plaintiff.

---

[28] *Supra*, Chapter IV.

The Commission recommends that:

10. "Performance" should be defined in an Illegal Transaction Act *to mean the stipulated, actual or intended performance of any person involved in a transaction.*

4. Transactions with Severable Provisions

In Working Paper No. 38, it was proposed that an *Illegal Contract Act* should apply to any transaction falling within the definition of "illegal contract," even if the provision giving rise to the illegality was severable.[29] Earlier in this Report, it was observed that the law governing severance was unduly technical and complicated. Later in this Report, recommendations are made concerning a power to sever illegal obligations from a contract. There is, however, a more fundamental question of whether the possibility of severance should justify the exclusion of an *Illegal Contract Act*. In New Zealand, section 3 provides that "illegal contract" includes a contract containing an illegal provision, whether or not severable. The South Australian Law Reform Committee endorsed that position.[30]

A court in exercising a power of severance is in effect granting a remedy. It follows that the likelihood of severance, whether by application of a "blue pencil" test or otherwise, should not be regarded as precluding the exercise of the court's discretion.

The Commission recommends that:

11. The fact that a provision of a transaction which renders it illegal may be severed should not per se *exclude the operation of an* Illegal Transaction Act.

5. Transactions to Which an Illegal Transaction Act Should Not Apply

(a) Generally

In certain cases it would be inappropriate to apply the terms of an *Illegal Transaction Act* to a transaction which would otherwise fall within our definition of "illegal transaction". The controversy which has arisen in New Zealand with the phrase "subject to the express provisions of any other enactment," illustrates the need to devise a form of words which would clearly stipulate those transactions to which an *Illegal Transaction Act* should not apply.

Enactments which specifically invalidate a contract (set out in Appendix A) may be categorized according to the reason for avoiding the contract. The various categories are set out in Appendix D. We have concluded that an *Illegal Transaction Act* should not apply to several of those categories, as well as to certain other categories of transactions. We will deal with each category separately. After each heading, we have listed the appropriate portion of Appendix D at which the enactments falling within that heading have been grouped.

(b) Transactions Invalid Against Creditors or Others by Reason of a Failure to Register (Appendix D (3), (10))

Some provincial and federal statutes provide that an unregistered transfer or assignment of an interest in property is invalid against third parties. In addition, several federal statutes provide that a transfer of shares in a company

[29] At 105.

[30] *Supra*, n. 1 at 24.

is invalid unless registered. In neither instance can a case be made for permitting the courts to intervene. The effect would be to re-order priorities in a manner not contemplated by the relevant statute.

(c) Transactions in Respect of Which no Action may be Brought by Reason of the Effluxion of Time (Appendix D (6))

Many limitation provisions would, when applicable, cause a transaction to fall within the ambit of our definition of "illegal transaction." An *Illegal Transaction Act* should not be a vehicle for extending limitation periods.

(d) Transactions or Provisions in Transactions Rendered Invalid if not Evidenced by a Memorandum in Writing or Signed by the Party to be Charged, or his Agent (Appendix D (7))

Both provincial and federal statutes contain such requirements in a number of Acts. Unlike other forms of illegal contracts, however, it has never been the case that restitutionary or other relief would be denied merely because a contract was not evidenced by a written memorandum. Indeed, courts of equity have tempered the effect of invalidating oral contracts by applying a rule of part performance. In our Report on the Statute of Frauds, we examined the law respecting the rights of parties to a contract unenforceable for want of writing.[31] The special nature of contracts unenforceable for want of writing, and the wide range of relief available, in such cases, justify exempting such contracts from the operation of an *Illegal Transaction Act*.

(e) Transactions Rendered Invalid by Reason of the Creation or Vesting of a Right After a Specified Period of Time (Appendix D (12))

The perpetuity rules should not be affected by an *Illegal Transaction Act*.

(f) Transactions Avoided by Frustration (Appendix D (13))

The *Frustrated Contract Act*[32] deals with the remedies available to a party to a frustrated contract. Applications for relief in respect of contracts avoided by frustration should continue to be governed by that Act.

(g) Transactions in Restraint of Trade

In Working Paper No. 41, entitled Covenants in Restraint of Trade, this Commission examined the law respecting such covenants. Covenants in retraint of trade would *prima facie* fall within the definition of an illegal transaction we have recommended, and unless specifically excluded would therefore be subject to the court's remedial powers under such legislation.

Covenants in restraint of trade present problems of a very different nature than other forms of illegal transactions. The general rule does not apply to such provisions in the same manner as it does to other illegal transactions. For that reason we have elected to consider the problems posed by covenants in restraint of trade in a separate Report, in which we shall deal with the relationship between our recommendations in that Report, and this Report.

---

[31] (1977) L.R.C. 33 at 13 *et seq*.

[32] R.S.B.C. 1979, c. 144.

(h) Minors' Contracts

There is one particular enactment governing contracts whose inclusion in the definition of "illegal contract" requires some comment. In 1976 this Commission released its Report on Minor's Contracts.[33] That Report considered both the question of the validity of contracts to which minors are parties, and the question of property rights acquired under such contracts. Specific recommendations were made concerning both questions. Although there is no reason why an *Illegal Transaction Act* should not apply to such contracts pending the implementation of our Report on Minor's Contracts, the *Illegal Transaction Act* should be specifically excluded when the recommendations contained in that Report are implemented.

The Commission recommends that:

12. An Illegal Transaction Act *should not apply to a transaction to the extent that:*

(a) it is invalid against any person by reason of a failure to register it,

(b) no action may be brought on it, it is extinguished, or any cause of action based upon it is extinguished, by reason of the efflux-ion of time,

(c) it is invalid or unenforceable by reason of it not being in writing, or signed by the party to be charged, or his agent,

(d) it is invalid by reason of the creation or vesting of a right after a specified period of time,

(e) it is avoided by frustration,

(f) it is invalid because it is in restraint of trade.

13. Legislation implementing our Report on Minors' Contracts should specifically exclude minors' contracts from an Illegal Transaction Act.

D. Remedies Under an Illegal Transaction Act

1. GENERALLY

Given that courts are to have a discretionary power to grant relief, then an obvious question arises concerning the nature of the relief which may be granted. In New Zealand, courts have been granted in section 7 of the *Illegal Contract Act* power to make a number of different types of orders, namely:

(i) restitution
(ii) compensation
(iii) variation of the contract
(iv) validation of the contract in whole or in part
(v) to vest property or direct any party to transfer or assign property to another party.

In Working Paper No. 38, it was proposed that tribunals granting relief have broader powers. The proposal read as follows:

> 8. Any remedy which would have been available at common law or in equity in respect of a contract had it not been illegal should be available under an *Illegal Contract Act*. Without restricting the generality of the foregoing, the court should be given specific powers to grant relief by way of:
>
> (a) restitution;
> (b) compensation, by way of damages or otherwise;
> (c) an order apportioning loss arising from the formation or performance of an illegal contract, but no relief should be granted under this provision for loss of profit;

[33] L.R.C. 26.

(d) an order declaring rights in or to any property affected by the terms of an illegal contract;
(e) an order vesting property affected by an illegal contract in any person, or directing any person to transfer or assign property to another person.

In view of Recommendation No. 3, which would prevent recourse to the present law, it is important that a court be given every opportunity to fashion appropriate remedies to answer the specific problems posed by the case before it. There are three approaches to this problem. The first is to say nothing respecting the appropriate remedies, and to merely give a court the power to grant "such relief as appears just." This view is taken by S.M. Waddams.[34] A second option is to specify a number of remedies coupled with a general power to grant whatever relief is just. This approach is adopted by section 7 of the New Zealand *Illegal Contracts Act*. The third approach is to specify a list of powers to which the court is limited. This is the solution adopted in Working Paper No. 38.

2. Is a Specific List of Remedies Desirable?

A provision granting to a court an open-ended power to fashion whatever remedy appears just is, at first blush, attractive. We cannot, however, endorse that option as a recommendation. It is, for example, not clear whether the phrase "such relief as appears just" would restrict courts to the type of relief available in a similar action in which no allegation of illegality was in issue. Courts could be permitted to exercise powers unknown at common law and in equity—such as the power to apportion losses. Waddams' suggested reform does not provide any guidance to courts or counsel respecting the proper remedies to be granted. A broad power to grant "such relief as appears just" goes much further than is actually required to ameliorate the harsh results of the general rule. Reform does not require an exchange of the undue rigour of the general rule for an open-ended statement of principle which does not provide guidance to anyone involved in an illegal transaction, and which could possibly encourage and complicate litigation.

The New Zealand solution is a compromise. It lists specific types of remedies and hence provides some guidance to the court. However, it also confers a very broad power on courts to do what is just in the circumstances. For this reason, we cannot recommend a similar solution, and have concluded that the type of relief available to the parties when a court decides to exercise its discretion in favour of intervening should be circumscribed by the *Illegal Transaction Act*.

3. Types of Remedies

(a) Validation

In New Zealand, courts have been given the power to validate an illegal contract "in whole or in part."[35] In Working Paper No. 38 it was proposed that such a power not be conferred in a British Columbia *Illegal Transaction Act*.

If a transaction is illegal in the sense that it violates a statute, there is no justification for permitting the courts to override completely the policy of the statute. Although we are more hesitant concerning transactions which are contrary to public policy, the reason such transactions fall within an *Illegal Transaction Act* in the first place is because, in the perception of the judge, enforcing that contract would have pernicious results. Preventing unjust

[34] *Law Reform Commission of British Columbia, Illegal Contracts, Working Paper No. 38, 1982*, (1983) 7 Can. Bus. L.J. 361 at 365.
[35] Section 7.

enrichments or unfair results does not require going to the opposite extreme and ordering the very result which is said to be contrary to statute or harmful to society.

We are supported in this conclusion by the results of the New Zealand cases in which this power has been considered. In *Dreadon* v. *Fletcher Development Co. Ltd.*,[36] the plaintiff granted the defendant, an overseas corporation, an option to purchase land zoned for farming. It was contended that the option was unlawful under Part IIA of the *Land Settlement Promotion and Land Acquisition Act, 1952*. Such a contract was not valid without the consent of the Land Valuation Tribunal, which had not been obtained. McMullin J. stated in *obiter dicta*:[37]

> The object of the statute is to keep a check on the sale of land within New Zealand to overseas interests and to ensure that these interests will not be able to acquire land in New Zealand save within certain safeguards laid down by the statute. The statute permits such acquisitions provided that the consent of the Land Valuation Court is obtained. Any relief now granted to the defendant would have the effect of doing no more than allowing the merits of the application to be determined by the court, which would be bound to have regard to s. 35H, which sets out the relevant considerations. The penalty imposed for a breach of the Act is in the case of a body corporate a fine not exceeding $1,000. I see nothing in the provision of a fine of that amount, nor the declaration that the transaction shall be unlawful and of no effect, which would preclude the operation of s. 7 or require me to exercise my discretion in a particular way. If, therefore, I were called upon to exercise my discretion under s. 7, I would exercise it in the defendant's favour by validating the option in its entirety.

This *obiter dicta* is unconvincing in a number of respects. McMullin J. did not specify why the general policy requiring consent should be overridden in the case at bar. Moreover, while the option could be validated by obtaining the requisite consent, the consent stipulated in the Act was that of the Land Valuation Court, which presumably has some expertise in these matters, and not of the Supreme Court, on whose bench McMullin J. sat. This is a clear example of the *Illegal Contracts Act* being used to override the general policy of another statute, exactly what the New Zealand Court of Appeal disparaged in *Harding* v. *Coburn*.[38] In that case the court clearly stated that it was no part of the purposes of the New Zealand *Illegal Contracts Act* to undermine the social or economic policies of other Acts.

Another example of the use of this power to override the policy of statute is *Slobbe* v. *Combined Taxis Co-operative Society Ltd.*[39] The appellant had borrowed money from the respondent in apparent contravention of the *Moneylenders Act 1908*. The respondent was not registered under that Act. Nevertheless, the contract was validated on the ground that nothing in the public interest required another result.[40] Is it desirable to put judges in the position of having to determine that a certain act expressly forbidden by statute is nevertheless one which may be permitted as not contrary to public policy?

Our correspondents were divided on whether a court should have power to validate an illegal contract. One wrote:

> I note with interest the recommendation in your paper that the New Zealand Act not be followed in so far as it enables a court to validate an otherwise illegal contract. I share this concern because it does not seem to me right to confer on a

---

[36] [1974] 2 N.Z.L.R. 11 (S.C.); [1973] Recent Law (N.S.) 38.

[37] *Ibid.* at 19-20. The option was held not to be illegal, subject to the appropriate court's consent.

[38] [1976] 2 N.Z.L.R. 577. *See also Hurrell* v. *Townend*, [1982] 1 N.Z.L.R. 536 in which a sale of land was validated by the New Zealand Court of Appeal without the approval of a Land Valuation Tribunal as required by the *Land Settlement Promotion Act, 1952*.

[39] [1973] 2 N.Z.L.R. 650 (C.A.); [1973] Recent Law (N.S.) 227.

[40] *Cf. Barsdell* v. *Kerr*, [1979] 2 N.Z.L.R. 731 (S.C.) *Slater* v. *Mall Finance & Investment Ltd.*, [1976] 2 N.Z.L.R. 1 (S.C.) in which relief under the *Illegal Contracts Act, 1970* was refused.

> court the power to rewrite a clearly expressed statutory or common law policy, even if in a particular case the policy may be mistaken. I would be particularly concerned about giving such broad discretion to a trial judge who may not always appreciate the factors entering into the design of a statutory prohibition.

On the other hand, several correspondents pointed out that the remedies specified in our proposals would amount in practice to validation. In this regard, they referred specifically to the proposed power to grant any relief which would have been available at common law or in equity had the transaction been legal.

We do not agree with those of our correspondents who see no distinction between "validation" of a transaction and awarding common law and equitable relief as if it were legal. "Validation" is not a remedy known to the current law. While it is true that in many cases courts under our recommendations may award relief on the same basis as if the transaction is legal, that step will only be taken if necessary to do justice between the parties in a given factual context. A power to validate a transaction as a form of judicial relief goes beyond extricating parties from an illegal contract to a scheme for judicial dispensation in advance of any need for extrication. For example, if two parties enter into a contract for the sale of wheat in a form not authorized by the *Canadian Wheat Board Act*,[41] and which is therefore void, and the illegality is discovered before anyone prejudices himself, we see no reason why the court should be involved in "validating" the contract.

At the same time, in the interests of flexibility the widest possible range of remedies should be available in those cases in which a tribunal's jurisdiction to grant relief is properly invoked. In some cases this may amount to something akin to validation. In most cases, we doubt that it will be necessary for courts to go that far.

We have concluded that courts should have the power to award any relief which would have been available at common law or in equity had the contract been legal. Such a power would include damages, declarations, injunctive relief, and specific performance. We acknowledge that it is difficult to define cases in which it will be necessary for such remedies to be given. In particular, we think courts will be slow to order specific performance of an illegal contract. We are concerned to both confine the type of relief which a tribunal might give within proper limits, and, within those limits, to provide for maximum flexibility. Rejecting "validation" as a power, but incorporating a general power to grant common law and equitable relief, achieves that end.

(b) Variation

(i) Generally

In Chapter V, it was noted that common law courts already exercise a limited power to vary an illegal contract by severing the illegal covenants contained in it. In exercising this power of severance, courts will not re-write the contract. Instead courts may "blue pencil" offending words, provided the balance of the contract is reasonable, grammatical and may be imposed fairly upon the other party.

In New Zealand, courts have been given a power to "validate" an illegal contract in part. This amounts in effect to a power of severance not limited by any "blue pencil" test.

A third option would be to give a tribunal a power to re-write an illegal transaction in order to impose upon the parties reasonable and legal obliga-

[41] R.S.C. 1970, c. C-12, s. 43; *see, e.g., Diversified Crops Ltd. v. Pattison Farms Ltd.*, (1975) 61 D.L.R. (3d) 749, *aff'd* 67 D.L.R. (3d) 190 (Alta. S.C.-A.D.).

tions. This would differ from "partial validation" and severance insofar as the court could go beyond the agreement as it stood and substitute a new arrangement.

(ii) A Power to Vary by Rewriting the Transaction

In our Working Paper on Covenants in Restraint of Trade,[42] we proposed that courts be given a power to modify covenants in restraint of trade by rewriting them so as to provide a covenantee with no more protection than was reasonably necessary in the circumstances.[43] Such a power would in fact be a form of "variation." However, covenants in restraint of trade are a special case. Rewriting such a covenant in fact would involve choosing, out of the universe of contractual restraints chosen by the parties, a set of enforceable obligations. This is functionally akin to severance divorced from any limitations imposed by the "blue pencil" test.

We have concluded that a tribunal should not have the power to vary a transaction and in particular, a contract, by re-writing it. Such a power would be exercised only when one party is reluctant to agree to a variation, since, if both parties were amenable to the change, no judicial involvement would be required. Giving a tribunal a power to impose obligations on an unwilling party to a contract goes beyond what is required to prevent unjust results. However just or reasonable such a revised arrangement might be, its rewriting would convert what is essentially a consensual relationship into an obligatory one. The parties, and not a tribunal, should be the best—and in our view, the only—judge of their own economic interests.

(iii) Partial Validation

We have also concluded that no power of "partial validation" as such should be found in an *Illegal Transaction Act*. We recognize that "severance" and "partial validation" may, in many cases, amount to the same thing. However, a power of partial validation may extend beyond the limited task of severing those portions of a contract which make it illegal. We note, in particular, that even a "partial validation" could involve a judicial dispensation which might have the effect of frustrating the object of an enactment.

(iv) Severance

In severing covenants in illegal contracts, courts under the present law have traditionally acted in a conservative fashion. The basic substratum of the contract is not altered. In severing illegal convenants, courts apply three basic criteria. If the covenant is severed, the balance of the contract must be capable of taking effect as a complete and workable arrangement. The obligations of the parties must also not be altered so substantially by the severance that it would be unreasonable to impute an intention to both parties to abide by the altered arrangement. Lastly, courts have applied a "blue pencil" test. Severance is accomplished by striking out words from the written document. We have concluded that a tribunal should continue to exercise a power to enforce an illegal transaction after severing such portions of it as may render the transaction illegal.

At the same time, some problems may arise if the blue pencil test is retained as a criterion of severability. In our Working Paper on Covenants in Restraint of Trade,[44] we rejected the blue pencil test of severability on the ground that it was unduly formalistic and arbitrary.

[42] Working Paper No. 41, 1983.
[43] *Ibid.* at 45–48.
[44] *Supra*, n. 42.

When a court severs words from a contract, it effectively alters the obligations of the parties. However, to achieve that end, the court under the "blue pencil" test must have undue regard to the manner in which the obligation is expressed. Nevertheless, it is the deletion of an obligation, or its modification, which is accomplished. For that reason, we have concluded that the power to sever should be expressed in terms of obligations under a transaction, subject to the usual test of reasonableness of result required to be met by the current law. Such a formulation underlines that the substance of the contract has been altered, and not merely its form.

We see no need to specifically abolish the blue pencil test, which will be preserved as a general remedy available at common law and equity. We do expect, however, that the broader language of our recommendation, when implemented in an *Illegal Transaction Act*, will result in the blue pencil test falling into disuse.

(c) Restitution

In Chapter II, it was pointed out that the general rule conflates two rules, and comprehends both unenforceability and non-intervention. A power to grant restitution would effectively abrogate the latter head of the general rule, a result with which we agree, as the court thereby gains the flexibility in appropriate cases to prevent unjust enrichment.[45]

(d) Compensation

The court should have the power, in appropriate cases, to award damages for breach of an illegal contract. That is not to say, however, that damages should be awarded in every case. However, a provision which taints a contract may be only a small part of an arrangement. Damages may be a more appropriate remedy than restitution in such a case.

The power to award "compensation" is potentially of broader scope than a power to award "damages." This would give the courts as great a degree of flexibility as possible. When some form of loss has been suffered, there is no reason to deny courts the power to make an order for compensation which is not limited to damages, or to the measure of loss appropriate in damages.

(e) Apportionment of Loss

The power to order compensation might usefully be augmented. Consider, for example, a contract to sell a pesticide, the sale of which is banned by environmental protection legislation. Assuming that both parties were innocent in the sense that they were unaware of the law, merely making a restitution order or ordering "compensation" by way of damages for the price of the pesticide could be to throw the unfortunate effects of the illegality entirely on one party. If the facts of the case show that neither party requires the pesticide for any purpose other than sale or for the destruction of pests, then arguably what is required is not restitution or compensation but the equitable adjustment of loss. Neither party should be put in a worse position than the other merely because the consideration for a transaction has or has not passed. In such a case it might be useful to give the court the power to calculate the loss which accrued to the supplier of the pesticide and to require the purchaser to pay one-half the loss. Since the loss was suffered by the inadvertence of both parties, it is fair that it be shared.

---

[45] In New Zealand the power to order restitution was exercised in *R.D. Bull Ltd. v. Broadlands Rentals Ltd.*, [1975] 1 N.Z.L.R. 304 (S.C.) *per* Chilwell J.

Conferring an express power on the courts to adjust losses in this manner is not entirely novel[46]. In the case of a frustrated contract a similar power already exists. Subsection 5 (3) of the *Frustrated Contract Act*[47] provides:

> Where the circumstances giving rise to the frustration or avoidance cause a total or partial loss in value of a benefit to a party required to make restitution . . . that loss shall be apportioned equally between the party required to make restitution and the party to whom restitution is required to be made.

Under section 8 of that Act, no account is to be taken of lost profits in determining such an apportionment.

When neither party is aware of the illegality, the case is functionally analogous to a frustration case. In both cases some overriding fact of which the parties were unaware changes the fundamental nature of performance. If illegal transaction legislation is adopted, its main purpose should be to assist parties in extricating themselves from the illegal arrangement. Accordingly the court should not take into account the potential profit from the illegal act when apportioning loss.

(f) Orders to Vest or Transfer Property

It is of prime importance that courts have the power under an *Illegal Transaction Act* to deal with questions of property rights in readjusting relations between the parties to an illegal transaction. In certain cases, an order directing the transfer of property may be fairer than merely directing pecuniary compensation. An *Illegal Transaction Act* should expressly provide for such an order.

The Commission recommends that:

14. In a proceeding respecting an illegal transaction, or property affected by it, a court should have the power to grant any remedy which it could have granted at common law or in equity, in respect of the transaction or property, as if the transaction were not illegal, and, in particular, the court should have the power to make an order for one or more of the following remedies:

- *(a) restitution;*
- *(b) compensation, by way of damages or otherwise;*
- *(c) apportionment of loss arising from the formation or performance of the transaction provided that no loss of profit shall be so apportioned;*
- *(d) a declaration;*
- *(e) an order vesting property in any person, or directing any person to assign or transfer property to another person;*
- *(f) an order that:*
  - *(i) certain rights or obligations arising out of the illegal transaction are not binding on the parties and that the remainder of the rights and obligations constitute a binding and enforceable transaction; or*
  - *(ii) the obligations arising out of an illegal transaction may be discharged in a lawful manner specified by the court*

provided that the court is satisfied that the remaining rights or obligations under the transaction, or the obligations to be performed, are reasonable.

---

[46] It has, for example, been held that the *Negligence Act*, R.S.B.C. 1979, c. 298 applies to permit courts to apportion liability in contract, since it refers to "fault" — see cases cited by Hinkson J.A. in *Surrey v. Carroll-Hatch and Associates Ltd.*, (1979) 14 B.C.L.R. 156 at 177 (B.C.C.A.). In Ontario, where courts have arrived at a different conclusion based on the different wording of the Ontario *Negligence Act*, R.S.O. 1980, c. 315, it has been suggested by LaCourcière J.A. that there is some basis for adopting a concept of contributory fault into contract law. *See Cossins v. Smith*, (1983) 25 C.C.L.T. 54 (Ont. C.A.).

[47] R.S.B.C. 1979, c. 144.

4. Terms and Conditions

Under section 7(b) of the New Zealand *Illegal Contract Act*, an order may be made upon terms. In *R.D. Bull Ltd.* v. *Broadlands Rentals Ltd.*,[48] this jurisdiction was exercised by compelling the borrower who obtained a refund of the purchase price to pay 10% of the price to the lender by way of rent. A similar power could be of considerable use in British Columbia.

The Commission recommends that:

15. Relief may be granted under an Illegal Transaction Act *subject to such terms and conditions as the court sees fit to impose.*

5. Factors Influencing the Exercise of the Discretion to Grant Relief

In Working Paper No. 38, we listed a number of factors which might be included in an *Illegal Transaction Act*. This was effectively a "laundry list" of relevant *indicia* of whether a grant of relief was appropriate. Comment was invited on those factors.

Only one correspondent specifically adverted to all the factors suggested as guidelines. Although he agreed that some guidance was desirable, he pointed out a number of cases where the list of factors could be condensed. Our recommendation reflects in part his suggestions.

The Commission recommends that:

16. An Illegal Transaction Act *should specify that in granting or denying relief, a court should consider:*

(a) whether granting relief would be contrary to the public interest;
(b) the facts and circumstances, including the intent, conduct, knowledge, and relationship of the parties, in relation to the formation or performance of the transaction;
(c) whether any party was, at a material time, acting under a mistake of fact or law;
(d) the object of an enactment giving rise to an illegality;
(e) the extent to which the illegal transaction has been performed;
(f) whether there has been substantial compliance with the enactment giving rise to the illegality;
(g) the consequences to any person of denying relief;
(h) any other relevant factor.

E. The Effect of Illegality

1. Generally

In Chapter VI, we examined the effects of illegality. Our conclusions on that issue might be summarized as follows:

1. The court will not enforce the contract if illegal by awarding common law or equitable remedies for its breach.
2. The court will not award restitutionary remedies in respect of benefits conferred under an illegal contract.
3. The contract, if executed, is effective to pass title to property, or other rights and obligations according to its terms.[49]
4. The court will protect title so acquired in the hands of the grantee, or a third party tracing title through the grantee.

---

[48] *Supra*, n. 45.

[49] We recognize that in view of *Clark* v. *Hagar* our third proposition cannot be said to be established beyond doubt. However, we are confident that it is correct.

In New Zealand, section 6 of the *Illegal Contracts Act* has a very different effect. It provides:

> (1) Notwithstanding any rule of law or equity to the contrary, but subject to the provisions of this Act and of any other enactment, every illegal contract shall be of no effect and no person shall become entitled to any property under a disposition made by or pursuant to any such contract:
>
> Provided that nothing in this section shall invalidate—
>
> (a) Any disposition of property by a party to an illegal contract for valuable consideration; or
>
> (b) Any disposition of property made by or through a person who became entitled to the property under a disposition to which paragraph (a) of this proviso applies—
>
> if the person to whom the disposition was made was not a party to the illegal contract and had not at the time of the disposition notice that the property was the subject of, or the whole or part of the consideration for, an illegal contract and otherwise acts in good faith.
>
> (2) In this section the term "disposition" has the meaning assigned to that term by section 2 of the *Insolvency Act 1967*.

This section must be read in conjunction with section 7 of the New Zealand *Illegal Contracts Act*. It provides that no person shall be granted relief under an illegal contract except in accordance with the Act,[50] and that third parties have standing to apply for relief.[51] The latter provision is necessitated by section 6, since a third party purchaser of goods or land, or a person who holds security on such goods may not wish to await the commencement of litigation by the original parties to the action to determine whether he has good title.

Accordingly, the position in New Zealand under the *Illegal Contract Act* is as follows:

1. The court will as a rule not enforce the contract if illegal, but may grant relief on application by a party or any other interested person.
2. The court will not grant restitutionary remedies in respect of an illegal contract except upon application under the Act.
3. A contract is ineffective to pass any right to, or title in property.
4. A party to an illegal contract may pass title to a third party only if the third party had no notice of the illegality by which his grantor obtained the apparent right to pass title and was not himself a party to the illegal contract. The third party may bring an action to vindicate his title.

The provisions of section 6 of the New Zealand *Illegal Contracts Act*, read with section 7, give rise to two issues. The first deals with the continued application of the general rule. We have already given our reasons in Chapter VII for recommending that the general rule continue to apply *prima facie* to illegal transactions. The second issue concerns the status of property under an illegal transaction. In New Zealand, except in the limited case of the *bona fide* grantee, the illegal contract is, by reason of section 6, "of no effect and no person shall become entitled to any property under a disposition made by or pursuant to any such contract." Section 6 then places a positive obligation on a subsequent grantee to prove that his acquisition of property affected by an illegal contract was *bona fide*.

2. Should Title Pass Under an Illegal Transaction?

We have concluded that the adoption of a provision barring the passing of title under an illegal transaction is not warranted in British Columbia. In particular, our objections to this provision are as follows:

[50] Subsection 7 (7).

[51] Subsection 7 (1), (2).

(a) Security of Title

Title to land in British Columbia is determined by certificates of indefeasible title based on entries in a Land Registry Office. It is important that a person dealing with a registered owner of land should not be compelled to go behind the register to ascertain the nature of the transaction by which the registered owner obtained title. This is particularly true if constructive notice alone would affect the purchaser's title. Although a purchaser of chattels must be concerned with the vendor's apparent title, and no questions concerning the integrity of a register arise, it is not currently the law that his inquiry into his vendor's title must extend to questions concerning the manner in which title was acquired. The objection in both cases concerning land and chattels is the same. A provision under which a grantee must prove his *bona fides* and lack of notice of the illegality imposes a substantial burden on grantees. In any contest, we believe that the interests of a third party are more deserving of protection than that of the original owner of the property in issue, who is after all a party to the illegal transaction.

(b) Section 6 is Anomalous

Under section 6, no title passes from grantor to grantee under an illegal contract. However, although title nominally remains in the grantor, under the Act he may be unable to bring action to recover possession. In Chapter VII, we expressed the view that such a result was undesirable insofar as it may encourage self-help remedies.

(c) Section 6 Preserves an Undesirable Aspect of the Current Law

Section 6 has one apparently unintended side effect. If the contract is ineffective to pass title, then only section 7 (7) of the New Zealand *Illegal Contracts Act* prevents an action being brought to recover the property in question. That section states:

> (7) Subject to the express provisions of any other enactment, no court shall, in respect of any illegal contract, grant relief to any person otherwise than in accordance with this Act.

The key words are "in respect of any illegal contract." If the illegal contract is ineffective to pass title, then the grantor would continue to have a pre-existing property right. He may therefore be able to recover his property by taking advantage of the exception to the general rule under which a court will enforce such a property right provided the illegal contract need not be pleaded. Such an action is arguably not brought "in respect of" an illegal contract, but rather in respect of a continuing proprietary interest. The result is not only to circumvent the rational assessment of the merits of the case contemplated by section 7 of the New Zealand Act, but also to revive the technical illogicality that the courts may grant relief from the consequences of an illegal contract provided it need not be pleaded by the plaintiff.

We are buttressed in our conclusion by the comments of one of our correspondents, who stated:

> The New Zealand Act provides that all illegal contracts are of no effect and do not transfer title. The British Columbia Commission rejects this provision pointing out that it would throw into doubt title to property including land title and might create anomalies by enabling the transferor to resort to proprietary remedies to recover what would remain "his property". There would also be criminal law problems under Canadian criminal law if the transferee attempted to put the property to any use inconsistent with the transferor's ownership. Rejection of the New Zealand approach is, it is submitted, sound.

The South Australian Committee arrived at a similar conclusion, but for different reasons:[52]

> . . . the common law has already provided a number of ways in which relief may be granted to persons whose contracts would otherwise be caught by illegality either at common law or by statute in a contract and it would seem unfortunate to force contracts with very varying kinds of illegality into a strait jacket . . . We would therefore suggest that instead of the present section 6 there should be in our Act a section stating that the remedies in this Act are in addition to any remedy already given by the common law or by any other statute in relation to illegal contracts

Although we do not agree with the conclusion that the common law should be preserved, we are fortified by the apparent conclusion that it would be inappropriate to provide as a matter of course that all illegal contracts are ineffective.

This is not to say, however, that we are of the view that in every case the grantee should be entitled to retain property transferred under an illegal contract, or that he do so without any corresponding obligation to compensate the grantor. Rather, if an issue arises respecting title to, or possession of property, then at most the court should possess a discretionary jurisdiction to vary property rights as appears just.

It is not necessary to make any formal recommendation to implement our conclusion on this point. If an *Illegal Transaction Act* is silent on the question of the "effect" of an illegal transaction, the rule at common law should prevail, and title will continue to pass under an illegal transaction.

F. Which Tribunals Should Have the Power to Grant Relief?

Throughout this chapter, we have referred to a "court" as exercising the power to modify in law the consequences of the application of the general rule. Given the conclusion that it is desirable to provide discretionary relief to a party to an illegal transaction, and to alter the circumstances in which such relief would be available, a question arises respecting the proper tribunal to exercise the discretion conferred by an *Illegal Transaction Act*. In New Zealand, the exercise of that discretion was at first confined to the Supreme Court (now the High Court) and to Magistrate's Court (now the District Court), although in 1976 jurisdiction under the Act was extended to Small Claims tribunals.[53]

In Working Paper No. 38 we stated:[54]

> We do not believe that any useful purpose is served by restricting jurisdiction to any particular court. Indeed, insofar as provincial law is relevant, it is appropriate that the Federal Court exercise a jurisdiction to grant relief from illegal contracts. Furthermore, if a matter is before a statutory tribunal or has gone to arbitration, it is appropriate that the tribunal or arbitrator also have the power to readjust relations between the parties insofar as they are exercising their proper jurisdiction in granting the type of relief they could have granted if no illegality had occurred.

We accordingly proposed that the power to grant relief should extend to any tribunal exercising its proper jurisdiction.[55] We emphasize that the tribunal under our proposal must exercise its *proper* jurisdiction. An *Illegal Transaction Act* would not, for example, confer power on an arbitrator to decide a question not submitted to him, or upon a judge of the Small Claims Division of the Provincial Court to award a sum in excess of $2,000 (the present statutory limit on his jurisdiction) merely because an illegality is involved.

---

[52] *Supra*, n. 1 at 34.

[53] *Small Claims Tribunal Act*, 1976 (N.Z.).

[54] At 73.

[55] *Ibid.* (Proposal 1.)

Very little adverse comment on this proposal was received. Given that it is confined to the "proper" jurisdiction of a tribunal, there is little about it that is controversial.

The Commission recommends that:

17. "Court" should be defined in an Illegal Transaction Act *to mean any court, tribunal, or arbitrator exercising its proper jurisdiction.*

G. Transition

In Working Paper No. 38, we adopted the New Zealand solution of having our proposals apply to contracts made before or after the Act came into force. We are not aware of any case in New Zealand in which this transition provision caused any problems.

One of our correspondents raised some questions concerning our proposal:

> In our opinion the application of the proposed act to contracts which have been entered into but in dispute can be supported by the Commission's forthright criticism of the existing state of the law. However, in our opinion it is too simplistic to assign to a party raising the defence of illegality a stigma which should operate to permit retrospective legislation. In our opinion Proposal No. 13 should be modified so as to preserve rights which have become crystallized in proceedings taken or begun before the proclamation of the act.

Although we do not think that the mere issuance of a writ should be regarded as "crystallizing" rights *inter partes*, we are concerned with the position of parties to an illegal transaction who may have altered their position on the strength of the current law. The commencement or defence of a lawsuit is only one manner in which a person may have changed his position.

At the same time, the retrospective operation of an *Illegal Transaction Act* is unlikely to prejudice a large number of people. Even if it does, the application of the general rule to transactions entered into before an *Illegal Transaction Act* comes into force may nevertheless lead to injustices. Rather than making the operation of an Illegal Transaction Act prospective only, we think it better in the case of a transaction entered into before an *Illegal Transaction Act* comes into force to permit the court to take the possibility of prejudice into account when it decides whether to grant a remedy in respect of a transaction which antedates the Act.

The Commission recommends that:

18. (1) An Illegal Transaction Act *should apply to transactions entered into before or after the Act comes into force, or to property transferred under or affected by such an illegal transaction.*

(2) In determining whether to grant relief under the Illegal Transaction Act *from the consequences of illegality in respect of a transaction entered into before an* Illegal Transaction Act *comes into force, or in respect of such property, the court should consider in addition to the matters listed in Recommendation 16 whether any person:*

(a) has so altered his position that granting a remedy would, in the circumstances, be inequitable;

(b) has commenced a proceeding involving the illegal transaction or property;

(c) has compromised a claim or proceeding in involving an illegal transaction or property.

CHAPTER IX CONCLUSIONS

A. General

In this Report, we have examined the law governing the position of parties to an illegal transaction Our examination of the law has included cases involving both contractual and non-contractual transactions, and the recommendations we have made for reforming that law for that reason go beyond those made in other Commonwealth jurisdictions.

The law governing illegal transactions is rooted in cases decided when both society and the legislation which governed it were considerably simpler than today. Moreover, frequently an inflexible application of the general rule would lead to injustice. Courts have accordingly striven to refine the law by creating exceptions, inventing technical distinctions, and employing creative statutory interpretation. Not surprisingly, this has left the law both archaic and confused. The unsatisfactory results and the need for reform, are universally recognized. Recommendations made in this Report will replace the current law with a simplified and uniform set of rules governing illegal transactions.

B. List of Recommendations

In Chapter VIII of this Report, we examined six issues which bear on the exercise of a remedial discretionary power to vary the consequences in law of "illegality." In the course of examining those issues, it became necessary to define a number of terms. The logical development of the text of Chapters VII and VIII of this Report has resulted in the definitions of terms used in our recommendations being scattered throughout the Report, rather than grouped at the beginning of the Report for ease of reference. Those readers who wish to review these definitions prior to studying the recommendations as a whole may find them in Recommendations 5, 6, 7, 8, 10 and 17.

1. *Legislation be enacted to reform the law governing illegal transactions. (Page 56)*
2. *The general rule should continue to apply to illegal transactions, subject to the exercise by a court of a discretionary power under such legislation to grant relief from the consequences of illegality. (Page 56)*
3. *In a proceeding between parties involved in an illegal transaction, no relief should be granted by a court in respect of an illegal transaction or any property affected by it, except as provided by the* Illegal Transaction Act. *(Page 59)*
4. *Courts should have power to grant relief under an* Illegal Transaction Act *unless:*
   (a) an enactment expressly provides that the Illegal Transaction Act *does not apply, or*
   (b) the enactment under which the illegality arises provides for relief from the consequences of illegality. (Page 61)
5. *(a) An* Illegal Transaction Act *should apply to "enactments."*
   (b) "Enactment" should be defined to mean "enactment" as defined in the Interpretation Acts of British Columbia and Canada. (Page 63)
6. *(a) An* Illegal Transaction Act *should apply to "transactions."*
   (b) "Transaction" should be defined to include any
      (i) contract, trust, power or other arrangement, or provision thereof, and

(ii) transfer, conveyance, deed, or other disposition of property. (Page 64)

7. *(a) An* Illegal Transaction Act *should also apply to "property."*
   (b) "Property" be defined to include money, or any type of obligation, power, right, interest or thing, which has been or is to be transferred, or which is otherwise affected by an illegal transaction. (Page 64)

8. *"Illegal transaction" should be defined for the purposes of an* Illegal Transaction Act *as any transaction which is null, void, illegal, unlawful, invalid, unenforceable, or otherwise ineffective, or in respect of which no action or proceeding may be brought by reason of:*
   (a) an enactment or a provision in an enactment, or
   (b) a rule of the common law or equity, relating to public policy, governing the formation, existence or performance of the transaction. (Page 68)

9. *An* Illegal Transaction Act *should provide that a transaction not be regarded as an illegal transaction by reason that its formation or performance is in breach of an enactment, or contrary to the object of an enactment, unless the object of the enactment clearly so requires. (Page 70)*

10. *"Performance" should be defined in an* Illegal Transaction Act *to mean the stipulated, actual or intended performance of any person involved in a transaction. (Page 71)*

11. *The fact that a provision of a transaction which renders it illegal may be severed should not* per se *exclude the operation of an* Illegal Transaction Act. *(Page 71)*

12. *An Illegal Transaction Act should not apply to a transaction to the extent that:*
   (a) it is invalid against any person by reason of a failure to register it,
   (b) no action may be brought on it, it is extinguished, or any cause of action based upon it is extinguished, by reason of the efflux-ion of time,
   (c) it is invalid or unenforceable by reason of it not being in writing, or signed by the party to be charged, or his agent,
   (d) it is invalid by reason of the creation or vesting of a right after a specified period of time,
   (e) it is avoided by frustration,
   (f) it is invalid because it is in restraint of trade. (Page 73)

13. *Legislation implementing our Report on Minors' Contracts should specifially exclude minors' contracts from an* Illegal Transaction Act. *(Page 73)*

14. *In a proceeding respecting an illegal transaction, or property affected by it, a court should have the power to grant any remedy which it could have granted at common law or in equity, in respect of the transaction or property, as if the transaction were not illegal, and, in particular, the court should have the power to make an order for one or more of the following remedies:*
   (a) restitution;
   (b) compensation, by way of damages or otherwise;

(c) *apportionment of loss arising from the formation or performance of the transaction provided that no loss of profit shall be so apportioned;*
(d) *a declaration;*
(e) *an order vesting property in any person, or directing any person to assign or transfer property to another person;*
(f) *an order that:*
(i) *certain rights or obligations arising out of the illegal transaction are not binding on the parties and that the remainder of the rights and obligations constitute a binding and enforceable transaction; or*
(ii) *the obligations arising out of an illegal transaction may be discharged in a lawful manner specified by the court*
provided that the court is satisfied that the remaining rights or obligations under the transaction, or the obligations to be performed, are reasonable. (Page 79)

15. *Relief may be granted under an* Illegal Transaction Act *subject to such terms and conditions as the court sees fit to impose. (Page 80)*

16. *An* Illegal Transaction Act *should specify that in granting or denying relief, a court should consider:*
(a) *whether granting relief would be contrary to the public interest;*
(b) *the facts and circumstances, including the intent, conduct, knowledge, and relationship of the parties, in relation to the formation or performance of the transaction;*
(c) *whether any party was, at a material time, acting under a mistake of fact or law;*
(d) *the object of an enactment giving rise to an illegality;*
(e) *the extent to which the illegal transaction has been performed;*
(f) *whether there has been substantial compliance with the enactment giving rise to the illegality;*
(g) *the consequences to any person of denying relief;*
(h) *any other relevant factor. (Page 80)*

17. *"Court" should be defined in an* Illegal Transaction Act *to mean any court, tribunal, or arbitrator exercising its proper jurisdiction. (Page 84)*

18. (1) *An* Illegal Transaction Act *should apply to transactions entered into before or after the Act comes into force, or to property transferred under or affected by such an illegal transaction.*
(2) *In determining whether to grant relief under the* Illegal Transaction Act *from the consequences of illegality in respect of a transaction entered into before an* Illegal Transaction Act *comes into force, or in respect of such property, the court should consider in addition to the matters listed in Recommendation 16 whether any person:*
(a) *has so altered his position that granting a remedy would, in the circumstances, be inequitable;*
(b) *has commenced a proceeding involving the illegal transaction or property;*
(c) *has compromised a claim or proceeding in involving an illegal transaction or property. (Page 84)*

C. A Draft Illegal Transaction Act

From time to time, we include draft legislation in a Report when it would assist the reader to understand the manner in which our recommendations might be implemented. Such draft legislation would be useful in this case, and accordingly arrangements were made to obtain the assistance of a member of Legislative Counsel's staff, who assisted a member of our legal staff to prepare a draft *Illegal Transaction Act*, which may be found in Appendix E to this Report.

The Commission has not considered this draft in detail, and does not make any formal recommendation that any legislation implementing recommendations made in this Report should follow the draft set out in Appendix E. The draft Act is offered only for the purpose of illustrating the lines along which legislation might proceed, and is not intended to bind any legislative draftsman called upon to prepare a Bill to implement this Report.

D. Acknowledgments

We wish to thank all those who took the time to consider and respond to the Working Paper which preceded this Report. In addition, we would like to acknowledge the contribution of a former Commissioner, Kenneth C. Mackenzie, who participated in settling the terms of Working Paper No. 38 (Illegal Contracts), and who assisted us in our deliberations which led to the settling of this Report. We also express our gratitude to Claire Riley of Legislative Counsel's office for her help in the preparation of the draft Act.

Finally, we wish to express our thanks to Fred Hansford, one of the Commission's staff lawyers. He carried the burden of research on this project, and, subject to direction from the Commission, prepared the Working Paper and this Report.

JOHN S. AIKINS
ARTHUR L. CLOSE
BRYAN WILLIAMS
ANTHONY F. SHEPPARD
RONALD I. CHEFFINS

November 18, 1983

APPENDICES

Appendix A

ENACTMENTS INVALIDATING CONTRACTS

In this Appendix, the enactments have been arranged according to the form of words used to invalidate or otherwise render ineffective a contract. The word "Act" has been omitted for the sake of convenience. All references to provincial and federal enactments are to the 1979 and 1970 revisions respectively, except where otherwise noted.

Title	Chapter	Section(s)
1. Void		
(a) *Provincial*		
Chattel Mortgage	48	16, 25
Company	59	79, 306
Credit Union	79	69
Fraudulent Preference	143	2, 3
Funeral Plan	147	4
Income Tax	190	40
Infants	196	21, 31
Insurance	200	129, 189
Insurance (Marine)	203	5
Land Title	219	218, 318
Liquor Control and Licensing	237	19
Medical Practitioners	254	94
Pension (College)	316	19
Pension (Municipal)	317	18
Pension (Public Service)	318	21
Pension (Teachers)	320	18
Perpetuity	21	18, 19, 20
Residential Tenancy	365	7
Sale of Goods	370	10, 20
Sale of Goods on Condition	373	22, 25
Securities	380	74
Trading Stamp	407	2
Warehouse Receipt	428	3
Workers Compensation	437	13
(b) *Federal*		
Bankruptcy	B-3	61, 69, 70, 71, 72
Quebec Savings Bank	B-4	40
Canada Pension Plan	C-5	64
Canadian Forces Superannuation	C-9	39
Canadian Wheat Board	C-12	43
Copyright	C-30	12
Canada Corporation	C-32	19, 79
Indian	I-6	28, 32, 90
Old Age Security	O-6	21
Patent	P-4	7, 53
Pension Benefits Standards	P-8	18
Canada Shipping	S-9	192
Canada Temperance	T-5	108
Winding-up	W-10	99
2. Null and void		
(a) *Provincial*		
Barristers and Solicitors	26	99, 100
Book Accounts	32	13
Builder's Lien	40	9, 18
Chattel Mortgage	48	15
Family Relations	121	48
Land (Wife Protection)	223	3
(b) *Federal*		
Carriage by Air	C-14	Schedule 1, Article 23

Title	Chapter	Section(s)
3. Absolutely void		
(a) *Provincial*		
Estate Administration	114	123
Infants	196	17
(b) *Federal*		
Merchant Seamen Compensation	M-11	10
Public Service Staff Relations	P-35	43
Public Service Superannuation	P-36	47
Unemployment Insurance	U-2 (1970-71-72, c.48)	48
Western Grain Stabilization	W-7.4 (1974-75-76, c.87)	24
4. Unlawful and void		
Federal		
Railway	R-2	265
5. Fraudulent and void		
(a) *Provincial*		
Patients Property	313	20
Sale of Goods in Bulk	371	9
(b) *Federal*		
Bankruptcy	B-3	73
6. Unlawful and null and void		
Provincial		
Railway	354	220
7. Illegal and void		
Federal		
Telegraphs	T-3	39
8. Void and of no effect		
Provincial		
Community Care Facility	57	12
Fraudulent Conveyance	142	1
Land Tax Deferment	218	3
9. Voidable		
Provincial		
Company	59	79
Insurance	200	134, 137
10. Invalid		
(a) *Provincial*		
Insurance (Motor Vehicle)	204	18
Labour Code	212	6
(b) *Federal*		
Banks and Banking Law Revision	S.C.1980-81, c.40	261
11. No [ ] shall [be effective] [have effect] [have any force or effect]		
(a) *Provincial*		
Petroleum and Natural Gas	323	133
(b) *Federal*		
Agricultural and Rural Development	A-4	8
Financial Administration	F-10	25
Fisheries Development	F-21	8
12. No [force, validity, or] effect		
(a) *Provincial*		
Wills Variation	435	12
(b) *Federal*		
Canada Shipping	S-9	62

Title	Chapter	Section(s)
13. No [ ] [is effective] [takes effect]		
Federal		
Financial Administration	F-10	80, 81
Trust Companies	T-16	80
14. A [ ] [has no force or effect] [does not take effect]		
(a) *Provincial*		
Insurance	200	131
(b) *Federal*		
Banks and Banking Law Revision	S.C.1980-81, c.40	273, 275
Employment Tax Credit	E-5.8 (1977-78, c.4)	7
Loan Companies	L-12	91
Trust Companies	T-16	82
15. Not effective		
Provincial		
Chattel Mortgage	48	25
16. No [ ] is of any force or effect		
Federal		
Banks and Banking Law Revision	S.C.1980-81, c.40	208
Telesat Canada	T-4	8
17. Unenforceable		
Provincial		
Consumer Protection	65	11, 12
Trade Practice	406	4
18. Not enforceable		
Provincial		
Condominium	61	33
Consumer Protection	65	39
Mineral	259	44
Residential Tenancy	365	10
Statute of Frauds	393	1, 2, 4
19. Invalid as contrary to public policy		
Provincial		
Human Tissue Gift	187	10
20. Not Valid		
Provincial		
Insurance	200	14
Land	214	94
Municipal	290	237, 348
Property Law	340	23
Real Estate	356	46
21. A [ ] shall not be [brought] [commenced]		
Provincial		
Infants	196	18
Property Law	340	6
Sale of Goods in Bulk	371	11
Statute of Frauds	393	5
22. No [ ] shall be [brought] [commenced]		
Provincial		
Consumer Protection (1967)	64	5
Human Rights Code	186	6
Insurance	200	24
Limitation	236	8
Sale of Goods in Bulk	371	11
Securities	380	60, 61, 67

Title	Chapter	Section(s)
23. No [ ] [shall lie] [lies]		
(a) *Provincial*		
Consumer Protection (1967)	64	16
Insurance Corporation	201	28
(b) *Federal*		
Pension	P-7	22
24. No [ ] is [valid] [valid and/or] [binding]		
(a) *Provincial*		
Insurance	200	121
(b) *Federal*		
Quebec Savings Bank	B-4	39, 41
Land Titles	L-4	88
Railway	R-2	21
Department of Transport	T-15	15
25. No [ ] [may be commenced] [is enforceable] [is maintainable] [is valid]		
(a) *Provincial*		
Consumer Protection	65	38
Liquor Distribution	238	7
Municipal	290	535, 856
Railway	354	86
Real Estate	356	62
(b) *Federal*		
Canada Shipping	S-9	536, 645
26. Shall not [bring] [maintain] an action		
Provincial		
Limitation	236	3
27. Is valid if . . . but not otherwise		
Provincial		
Perpetuity Act	321	24
28. In lieu of any right of action		
Provincial		
Workers Compensation	437	10
29. Notwithstanding [a] [any] [ ]		
Provincial		
Consumer Protection (1967)	64	23
Mortgage Brokers	283	20
Residential Tenancy	365	64
30. Not [entitled] [binding]		
Provincial		
Consumer Protection (1967)	64	25
Consumer Protection	65	35, 38
31. No [ ] is void unless		
Federal		
Bills of Exchange	B-5	59
32. No [ ] is [valid] [effective] unless [until]		
Federal		
Canada Cooperative Associations	C-28.5 (1970-71-72, c.6)	48
Cooperative Credit Associations	C-29	26
Canada Corporations	C-32	39, 184
Customs	C-40	75
Indian	I-6	24
Canada and British Insurance Companies	I-15	90
Loan Companies	L-12	43, 86(5)
National Energy Board	N-6	17
Railway	R-2	19

Title	Chapter	Section(s)
Telesat Canada	T-4	20
Trust Companies	T-16	36
33. Avoided		
Provincial		
Frustrated Contract	144	4

APPENDIX B

ENACTMENTS PROVIDING FOR RELIEF

In this Appendix, we set out the text of several enactments which specifically provide that relief from an illegal contract may be granted, notwithstanding the terms of the enactment. All references to provincial and federal enactments are to the 1979 and 1970 revisions respectively, unless otherwise noted.

(a) Provincial

CHAPTER 59
COMPANY ACT

Contract enforceable

128. Notwithstanding that a contract to which a company is a party is made in contravention of section 126 or 127, a bona fide lender for value without notice, or the company, may enforce the contract. 1973-18-126.

Validity

146. The circumstance that a director is, in any way, directly or indirectly, interested in a proposed contract or transaction, or a contract or transaction, with the company shall not make the contract or transaction invalid, but, if the matters referred to in section 145 (1) have not occurred, the court may, on the application of the company or any interested person, enjoin the company from entering into the proposed contract or transaction, or set aside the contract or transaction, or make any other order that it considers appropriate. 1973-18-145.

Remedy of irregularities

230. (1) Where any omission, defect, error or irregularity has occurred in the conduct of the business or affairs of a company whereby

(a) a breach of a provision of this Act has occurred;
(b) there has been default in compliance with the memorandum or articles of the company; or
(c) proceedings at or in connection with any general meeting, class meeting, series meeting, or meeting of the directors of the company, or any assembly purporting to be such a meeting have been rendered ineffective, notwithstanding any other provisions of this Act, the court
(d) may, either of its own motion, or on the application of any interested person, make an order to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of the omission, defect, error or irregularity, or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of the omission, defect, error or irregularity, and may give ancillary or consequential directions it considers necessary; but
(e) shall, before making an order, consider its effect on the company and its directors, officers, members and creditors.

(2) No order made under subsection (1) shall prejudice the rights of any third party who has acquired those rights for valuable consideration without notice of the omission, defect, error or irregularity cured by the order.

Court may validate

266. Where a company has purported to issue or allot shares and the creation, issue or allotment of those shares is invalid by reason of a provision of this or any other Act, or of the memorandum or articles of the company, or otherwise, or if the terms of issue or allotment are inconsistent with or unauthorized by such a provision, the court may, on application by the company, a holder of any of those shares or a creditor of the company, and on being satisfied that in all the circumstances it is just and equitable so to do, make an order validating the creation, issue or allotment of those shares, or confirming the terms of issue or allotment of them, or both and, on the order being made, those shares shall be deemed to have been validly created, issued or allotted on the terms of the issue or allotment of them. 1973-18-263.

CHAPTER 64
CONSUMER PROTECTION ACT, 1967

[Repeal to be proclaimed]

Contracts relief

19. Where, having regard to all conditions and circumstances of an executory contract, or a borrowing transaction, and the state of account between buyer and seller, or borrower and lender, it is shown that the exercise of the seller's or lender's rights against a buyer or borrower in default is harsh and unconscionable, or otherwise inequitable, the court or a judge may impose terms and conditions on the parties to the executory contract, or borrowing transaction, so as to relieve against an inequitable exercise of legal rights by the seller, or lender, or avoidable loss to either party. 1971-11-7.

Civil consequences of failure to comply with Part 3

25. (1) A failure to comply with Part 3 of this Act does not avoid, or render unenforceable, an agreement between a lender and a borrower or buyer.

(2) If the failure to comply is due only to a bona fide error, or omission, other than in the quotation of the cost of borrowing, and the error or omission did not prevent the prospective borrower or buyer from obtaining a knowledge of the essential elements of the proposed agreement, the burden of proving which lies on the lender or a person claiming through him, the rights of the lender or a person claiming through him to recover according to the agreement shall not be affected.

(3) If the failure to comply is due to a bona fide error, the burden of proving which lies on the lender or a person claiming through him, in the quotation of the cost of borrowing either in the dollar and cent expression or in the annual percentage rate or scale of annual percentage rates, the lender or a person claiming through a lender may recover only the principal sum together with the lesser of the dollar and cent cost expression, or the amount determined from the annual percentage rate or scale of annual percentage rates.

(4) If the failure to comply is due to any other error or omission, the lender or a person claiming through a lender is not entitled to recover any amount in excess of the principal sum.

(5) The borrower or buyer is entitled to recover any amount paid by him in excess of the amounts recoverable by the lender as described in subsections (3) or (4).

(6) In determining whether or not there has been a failure to comply with Part 3, due regard shall be had to any tolerance permitted by the regulations

and no quotation shall be held to be erroneous if it is within the limits of an applicable permitted tolerance.

(7) This section does not affect the jurisdiction conferred on a court or judge by Part 4. 1968-10-13.

CHAPTER 79
CREDIT UNION ACT

Illegal acts

104. (1) Where an omission, defect, error or irregularity has occurred in the conduct of the business or affairs of a credit union where

(a) a breach of this Act has occurred;

(b) there has been default in compliance with the constitution or rules of the credit union; or

(c) proceedings at or in connection with any general meeting, or meeting of the directors of the credit union, or any assembly purporting to be such a meeting have been rendered ineffective, notwithstanding anything in this Act, the court

(d) may, either of its own motion or on the application of an interested person, make an order to rectify or cause to be rectified or to negate or modify or cause to be modified the consequences in law of the omission, defect, error or irregularity, or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of the omission, defect, error or irregularity, and may give ancillary or consequential directions as it considers necessary; but

(e) shall, before making an order, consider its effect on the credit union and its directors, officers, members and creditors.

(2) An order made under subsection (1) does not prejudice the rights of a third party who has acquired those rights for valuable consideration without notice of the omission, defect, error or irregularity cured by the order. 1975-17-105.

CHAPTER 219
LAND TITLE ACT
Division (10)

Rights of purchaser when plan not deposited

111. (1) Where a person sells or transfers or agrees to sell or transfer a parcel purporting to be described according to a plan of subdivision before the plan has been deposited pursuant to this Act, a purchaser or transferee, or a person claiming under either, who has purchased or accepted delivery of a transfer without knowledge of the nondeposit of the plan, or of the necessity for its deposit, may at his option, on acquiring knowledge of it, rescind the contract of purchase and recover

(a) all money paid under it, with lawful interest; and

(b) all taxes paid and other expenses incurred in consequence of the purchase, with lawful interest.

(2) Where the contract is rescinded, the purchaser, transferee or other person has a lien for all sums referred to in subsection (1) on the land of the vendor included in the plan of subdivision.

(3) Notwithstanding subsections (1) and (2), where the purchaser does not exercise his right to rescind, the vendor remains bound.

(4) Liens created under this section rank equally.

(5) In this section, "contract" includes transfer. 1978-25-111.

CHAPTER 390
SOCIETY ACT

Court may remedy irregularities

86. (1) Where an omission, defect, error or irregularity occurs in the conduct of the affairs of a society whereby

(a) a breach of this Act occurs;

(b) there is default in compliance with the constitution or bylaws of the society; or

(c) proceedings at or in connection with a general meeting, a meeting of the directors of the society or an assembly purporting to be such a meeting are rendered ineffective,

notwithstanding anything in this Act, the court may, either of its own motion or on the application of an interested person, make an order

(d) to rectify or cause to be rectified or to negate or modify or cause to be modified the consequences in law of the omission, defect, error or irregularity; or

(e) to validate an act, matter or thing rendered or alleged to have been rendered invalid by or as a result of the omission, defect, error or irregularity,

and may give the ancillary or consequential directions it considers necessary; but the court shall, before making an order, consider the effect of it on the society and its directors, officers, members and creditors.

(2) An order made under subsection (1) does not prejudice the rights of a third party who has acquired those rights for valuable consideration without notice of the omission, defect, error or irregularity cured by the order. 1977-80-86.

(b) Federal

Anti-Inflation Act
A-15.3

[S.C., 1974-75-76, c. 75]

Orders

Contravention of guidelines

20. (1) Where the Administrator is satisfied that a person has contravened, is contravening or is likely to contravene the guidelines, he may make such order as he deems appropriate to prohibit the person from contravening the guidelines generally, or in a particular manner specified in the order.

Where excess revenue derived in course of business

(2) Where a person has, as a result of a contravention of the guidelines, derived revenue in the course of a business that exceeds the revenue he would have derived if he had not contravened the guidelines, the Administrator may

make such order as he deems appropriate to accomplish either or both of the following objectives:

(a) to prohibit the person from continuing to contravene the guidelines generally, or in a particular manner specified in the order; and

(b) to require the person to return to the persons from whom he derived the excess revenue, if those persons are reasonably identifiable or, in any other case, to rebate to persons doing business with him, an amount stated in the order equal to the whole or any portion of the excess revenue so derived, as estimated by the Administrator.

Alternative form of order

(3) Where the Administrator is authorized by subsection (2) to make an order against a person but, in the opinion of the Administrator, an order to accomplish the objective described in paragraph (2)(b) would not be practicable, the Administrator may, in lieu thereof, by order, require the person to pay to Her Majesty in right of Canada an amount stated in the order equal to the whole or any portion of the excess revenue, as estimated by the Administrator.

Where excess amount paid or credited

(4) Where a person has contravened the guidelines by paying or crediting as compensation or as a dividend, an amount that exceeds the amount that he was, under the guidelines authorized to so pay or credit, the Administrator may make such order as he deems appropriate to accomplish either or both of the following objectives:

(a) to prohibit the person from continuing to contravene the guidelines generally, or in a particular manner specified in the order; and

(b) to require the person to pay to Her Majesty in right of Canada or to both so pay and withhold and pay an amount or amounts stated in the order equal in the aggregate to the whole or any portion of the excess payment or credit, as estimated by the Administrator.

Where excess revenue derived otherwise than in course of business

(5) Where a person has, as a result of an Act or omission that he knew or ought reasonably to have known contravened the guidelines, received any compensation or a dividend in an amount or value that exceeds that which he would have received if the person from whom he received the compensation or dividend had not contravened the guidelines, the Administrator may make such order as he deems appropriate to accomplish either or both of the following objectives:

(a) to prohibit the person from accepting any further such compensation or dividend in an amount or value that exceeds that which he would have received if the person from whom he received the compensation or dividend had not contravened the guidelines; and

(b) to require the person to pay to Her Majesty in right of Canada an amount stated in the order equal to the whole or any portion of the excess amount or value so received, as estimated by the Administrator.

Limitation

(6) Where the Administrator makes orders under paragraphs (4)(b) and (5)(b) arising out of the same circumstances, the aggregate of the amounts

stated in the orders shall not exceed the greater of the excess payment or credit and the excess amount or value received in the particular circumstances, as estimated by the Administrator.

Penalty amount in case of knowing contravention

(7) Where the circumstances that give rise to the making of an order under paragraph (2)(b), subsection (3) or paragraph (4)(b) or (5)(b) disclose that the person against whom the order was made knowingly contravened the guidelines, the Administrator, in addition to making such order, may, by order, direct the person to pay to Her Majesty in right of Canada a penalty in an amount equal to 25% of

(a) the excess revenue or other amount or value derived or received by the person at a time when he knew that such amount or value was derived or received in contravention of the guidelines, as estimated by the Administrator pursuant to paragraph (2)(b), subsection (3) or paragraph (5)(b), or

(b) the excess amount paid or credited by the person at a time when he knew that such payment or crediting was in contravention of the guidelines, as estimated by the Administrator pursuant to paragraph (4)(b), whichever is applicable.

Effect of order

(8) An order of the Administrator made pursuant to subsection (1), paragraph (2)(a), (4)(a) or (5)(a) is binding on the person against whom it is made notwithstanding any agreement that was entered into after October 13, 1975 (whether before or after the order was made), notwithstanding any other Act or law enacted or made before or after the coming into force of this Act, and notwithstanding that the order conflicts with anything that was established in accordance with or approved pursuant to any such other Act or law. 1974-75-76, c. 75, s. 20, s. 98, s. 6; 1977-78, c. 26, s. 3.

Combines Investigation Act
C-23

Powers of Federal Court where patents used to restrain trade

29. In any case where use has been made of the exclusive rights and privileges conferred by one or more patents for invention or by one or more trade marks so as

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce, or

(b) to restrain or injure, unduly, trade or commerce in relation to any such article or commodity, or

(c) to prevent, limit or lessen, unduly, the manufacture or production of any such article or commodity or unreasonably to enhance the price thereof, or

(d) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity,

the Federal Court of Canada, on an information exhibited by the Attorney General of Canada, may for the purpose of preventing any use in the manner defined above of the exclusive rights and privileges conferred by any patents

or trade marks relating to or affecting the manufacture, use or sale of such article or commodity, make one or more of the following orders:

(e) declaring void, in whole or in part, any agreement, arrangement or licence relating to such use;

(f) restraining any person from carrying out or exercising any or all of the terms or provisions of such agreement, arrangement or licence;

(g) directing the grant of licences under any such patent to such persons and on such terms and conditions as the court may deem proper, or, if such grant and other remedies under this section would appear insufficient to prevent such use, revoking such patent;

(h) directing that the registration of a trade mark in the register of trade marks be expunged or amended; and

(i) directing that such other acts be done or omitted as the Court may deem necessary to prevent any such use;

but no order shall be made under this section that is at variance with any treaty, convention, arrangement or engagement with any other country respecting patents or trade marks to which Canada is a party. R.S., c. 314, s. 30.

Canadian and British Insurance Companies Act
I-15

Amalgamation, transfer and reinsurance

90. (1) Every company registered under Part III to transact the business of life insurance, whether alone or in combination with any other class of insurance business, has power, with the permission of the Minister, to make an agreement

(a) to amalgamate its property and business with the property and business of any other such company that is registered to transact the classes of business to be so amalgamated;

(b) to transfer all or any portion of its policies or of its property and business to, or to reinsure all or any portion of its policies in, any company that has the power to make such an agreement and holds a certificate of registry from the Minister, under this or any other Act, to transact the classes of insurance business to be so transferred or reinsured; or to transfer all or any portion of its policies, other than its policies in Canada, to or to reinsure the same in any company not so registered that has the power to make such an agreement; or

(c) to purchase and take over all or any portion of the business and property, or to reinsure all or any portion of the policies, of any company whether so registered or not that transacts the business of life insurance within Canada or elsewhere, whether alone or in combination with other classes of insurance business, being classes of insurance business that the purchasing or reinsuring company is registered to transact;

and to enter into all contracts and undertakings necessary thereunto, but no such agreement is effective until it is sanctioned by the Minister.

Acquisition of business of other companies by purchase of shares

(2) Without limiting the powers a company has under subsection (1), any company to which that subsection applies may, for the purpose of

acquiring the business and property of a company pursuant to that subsection, purchase not less than sixty-seven per cent of the outstanding shares of any other insurance company incorporated under the laws of Canada or of any province thereof subject to the following provisions:

(a) no such purchase shall be made unless authorized by the Minister;

(b) the Minister may authorize such purchase on the report of the Superintendent, supported by evidence that

(i) an offer to purchase has been made to all the shareholders of the other insurance company and has been accepted by the holders of at least sixty-seven per cent of the outstanding shares thereof, such evidence of acceptance being in the form of written agreements or in the form of a resolution signed by or on behalf of the shareholders voting therefor, in person or by proxy, at a meeting of the shareholders duly called to consider the offer, or being partly in one form and partly in the other, and

(ii) the purchase has been approved by at least three-fourths of the votes cast by shareholders and three-fourths of the votes cast by policyholders at a special general meeting of the company duly called to consider the purchase;

(c) the power to purchase shares under this subsection is in addition to the powers set forth in sections 63 and 65 and the limitations, conditions and exceptions contained in those sections do not apply to any such purchase of shares; and

(d) where a company has purchased shares under this subsection, the company shall, under the provisions of subsection (1), acquire the business, rights and property, and assume the duties, obligations and liabilities, of the other insurance company within the period of two years after the purchase has been authorized by the Minister, but on being satisfied that the circumstances so warrant, the Minister may extend that period from time to time; and after the expiration of that period and of any extension thereof, the said shares shall not be allowed as assets of the purchasing company in the annual report prepared by the Superintendent for the Minister and the Superintendent may direct the company to sell or otherwise absolutely dispose of the shares.

Sanction of Minister

(3) When any such agreement has been entered into, the directors of the companies that are parties thereto may, on compliance with this section, apply to the Minister to sanction the agreement, and the Minister, after hearing the directors and other persons whom he considers entitled to be heard upon the application or giving them an opportunity to be heard, may sanction the agreement if the Minister is satisfied that no sufficient objection to the agreement has been established.

Procedure

(4) Before any such application is made to the Minister,

(a) notice of intention to make the application shall be published in the Canada Gazette, stating the day on or after which the application will be made, such day being at least thirty days after the date of publication of the notice;

(b) a copy of the notice together with

(i) a statement of the nature and terms of the agreement,

(ii) an abstract of the material facts embodied in the agreement, and

(iii) copies of the actuarial and other reports upon which the agreement is founded, including a report by an independent actuary, shall be served on the shareholders, members and policyholders in Canada of the companies concerned, by transmission through the post office to the registered or other known address of each shareholder, member and policyholder, and within such period that they may be delivered in due course of delivery at least thirty days before the day stated in the notice on or after which the application will be made but the Minister may dispense with such service to the extent that, in his view, the circumstances of the case so warrant; and

(c) the agreement shall be open to the inspection of the shareholders, members and policyholders at the principal offices of the companies for a period of at least thirty days after service of the notice and documents provided for in paragraph (b), or after the Minister may have dispensed with such service; and any shareholder, member, or policyholder is entitled to a copy of the agreement on request therefor in writing to the principal office of the company of which he is a shareholder, member or policyholder, as the case may be.

Minister may shorten notice or inspection period

(5) In any case where in the opinion of the Minister the interests of a group of policyholders affected by an agreement entered into pursuant to subsection (1) may be prejudiced by delay in the agreement becoming effective, he may shorten the period of thirty days referred to in paragraph (4)(a) and the like periods referred to in paragraphs (4)(b) and (c) to the extent that, in his view, the circumstances of the case warrant.

Deposit of documents

(6) Whenever the Minister sanctions an agreement under this section, the companies concerned or the combined or continuing company, as the case may be, shall, within ten days after the date of sanction, deposit with the Superintendent,

(a) certified copies of the statement of the assets and liabilities of each company concerned,

(b) a statement of the nature and terms of the agreement,

(c) a certified copy of the agreement,

(d) certified copies of the actuarial and other reports upon which the agreement is founded, and

(e) a declaration under the hands of the president and manager of each company that to the best of their knowledge and belief every payment made or to be made to any person whatever on account of the agreement is therein fully set forth and that no payments, other than those set forth, have been made or are to be made in money, policies, securities or other property or valuable consideration, by or with the knowledge of any of the parties to the agreement.

Capital to be unimpaired

(7) A company registered under Part III shall not be permitted to amalgamate its business with or to transfer its business to, or to reinsure its business in any other company, if the capital of the combined company after such amalgamation, or of the continuing company after such transfer or reinsurance, would be impaired, nor shall any company so registered and having an impaired capital be permitted to purchase and take over the business and property, or any portion thereof, or to reinsure all or any portion of the policies of any other company, whether so registered or not, that transacts the business of life insurance in Canada or elsewhere.

Sanction of Minister

(8) A company registered under Part III shall not amalgamate with, transfer its business to, or reinsure its business in, another company, whether so registered or not, unless such amalgamation, transfer, or reinsurance is sanctioned by the Minister in accordance with this section.

Certificate of amalgamation

(8.1) When the Minister sanctions an amalgamation agreement under this section, he shall issue a certificate of amalgamation to the combined company (in this section called the "amalgamated company").

Effect of certificate

(8.2) On the date shown in the certificate of amalgamation

(a) the amalgamation agreement has full force and effect and the amalgamating companies are amalgamated and continued as one company under the name and in accordance with such terms and conditions as are set forth in the amalgamation agreement;

(b) the property of each amalgamating company continues to be the property of the amalgamated company;

(c) the amalgamated company continues to be liable for the obligations of each amalgamating company;

(d) an existing cause of action, claim or liability to prosecution is unaffected;

(e) a civil, criminal or administrative action or proceeding pending by or against an amalgamating company may be continued to be prosecuted by or against the amalgamated company; and

(f) a conviction against, or ruling, order or judgment in favour of or against, an amalgamating company may be enforced by or against the amalgamated company.

Ordinary reinsurance exempted

(9) This section does not apply to contracts of reinsurance made by companies in the ordinary course of their business. R.S., c. I-15, s. 90; R.S., c. 19(1st Supp.), s. 52; 1976-77, c. 39, s. 15.

Public Service Staff Relations Act
P-35

Direction

47. Where the certification of a bargaining agent for a bargaining unit is revoked by the Board pursuant to section 41, 42, 43 or 44 and as a result thereof a collective agreement or arbitral award binding on the employees in the bargaining unit ceases to be in effect or a collective agreement or arbitral

award applying to the bargaining unit is void, the Board shall, on application to it by or on behalf of any employee and in accordance with any regulations made by it in respect thereof, direct the manner in which any right acquired by, or determined by the Board to have accrued to, an employee that is affected by the revocation is to be recognized and given effect to. 1966-67, c. 72, s. 47.

Combines Investigation Act
C-23

An Act to provide for the investigation of combines, monopolies, trusts and mergers

Definitions

31.4 (1) For the purposes of this section,

"exclusive dealing"

"exclusive dealing" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or his nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or his nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to him on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

"market restriction"

"market restriction" means any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market;

"tied selling"

"tied selling" means

"tying"

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to

(i) acquire some other product from the supplier or his nominee, or

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or his nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to him on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

Exclusive dealing and tied selling

(2) Where, on application by the Director, and after affording every supplier against whom an order is sought a reasonable opportunity to be heard, the Commission finds that exclusive dealing or tied selling, because it

is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in the market,

(b) impede introduction of a product into or expansion of sales of a product in the market, or

(c) have any other exclusionary effect in the market,

with the result that competition is or is likely to be lessened substantially, the Commission may make an order directed to all or any of such suppliers prohibiting them from continuing to engage in such exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

Market restriction

(3) Where, on application by the Director, and after affording every supplier against whom an order is sought a reasonable opportunity to be heard, the Commission finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product, the Commission may make an order directed to all or any of those suppliers prohibiting them from continuing to engage in market restriction and containing any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product.

Where no order to be made and limitation on application of order

(4) The Commission shall not make an order under this section where, in its opinion,

(a) exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market,

(b) tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies, or

(c) tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by him and is reasonably necessary for such purpose,

and no order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among companies, partnerships and sole proprietorships that are affiliated.

Where company, partnership or sole proprietorship affiliated

(5) For the purposes of subsection (4),

(a) a company is affiliated with another company if

(i) one is a subsidiary of the other,

(ii) both are subsidiaries of the same company,

(iii) both are controlled by the same person, or

(iv) each is affiliated with the same company;

(b) a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person; and

(c) a company, partnership or sole proprietorship is affiliated with another company, partnership or sole proprietorship in respect of any agreement between them whereby one party grants to the other party the right to use a trade mark or trade name to identify the business of the grantee, provided

(i) such business is related to the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers, and

(ii) no one product dominates such business.

When company deemed to be controlled

(6) For the purposes of this section, a company is deemed to be controlled by a person if shares of the company carrying voting rights sufficient to elect a majority of the directors of the company are held, other than by way of security only, by or on behalf of that person.

When persons deemed to be affiliated

"first"

"second"

(7) For the purposes of subsection (4) in its application to market restriction, where there is an agreement whereby one person (the "first" person) supplies or causes to be supplied to another person (the "second" person) an ingredient or ingredients that the second person processes by the addition of labour and material into an article of food or drink that he then sells in association with a trade mark that the first person owns or in respect of which the first person is a registered user, the first person and the second person are deemed, in respect of such agreement, to be affiliated. 1974-75-76, c. 76, s. 12.

APPENDIX C

NEW ZEALAND ILLEGAL CONTRACTS ACT, 1970

An Act to Reform the Law Relating to Illegal Contracts

[1 December 1970

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title—This Act may be cited as the Illegal Contracts Act 1970.

2. Interpretation—In this Act, unless the context otherwise requires,—

"Act" means any Act of the General Assembly; and includes any Act of the Parliament of England, of the Parliament of Great Britain, or of the Parliament of the United Kingdom, which is in force in New Zealand:

"Court" means the Supreme Court or a Magistrate's Court that has jurisdiction under section 9 of this Act:

"Enactment" means any provision of any Act, regulations, rules, bylaws, Order in Council, or Proclamation; and includes any provision of any notice, consent, approval, or direction which is given by any person pursuant to a power conferred by any Act or regulations:

"Property" means land, money, goods, things in action, goodwill, and every valuable thing, whether real or personal, and whether situated in New Zealand or elsewhere; and includes obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property.

3. "Illegal contract" defined—Subject to section 5 of this Act, for the purposes of this Act the term "illegal contract" means any contract that is illegal at law or in equity, whether the illegality arises from the creation or performance of the contract; and includes a contract which contains an illegal provision, whether that provision is severable or not.

4. Act to bind the Crown—This Act shall bind the Crown.

5. Breach of enactment—A contract lawfully entered into shall not become illegal or unenforceable by any party by reason of the fact that its performance is in breach of any enactment, unless the enactment expressly so provides or its object clearly so requires.

6. Illegal contracts to be of no effect—(1) Notwithstanding any rule of law or equity to the contrary, but subject to the provisions of this Act and of any other enactment, every illegal contract shall be of no effect and no person shall become entitled to any property under a disposition made by or pursuant to any such contract:

Provided that nothing in this section shall invalidate—

(a) Any disposition of property by a party to an illegal contract for valuable consideration; or

(b) Any disposition of property made by or through a person who became entitled to the property under a disposition to which paragraph (a) of this proviso applies—

if the person to whom the disposition was made was not a party to the illegal contract and had not at the time of the disposition notice that the property was the subject of, or the whole or part of the consideration for, an illegal contract and otherwise acts in good faith.

(2) In this section the term "disposition" has the meaning assigned to that term by section 2 of the Insolvency Act 1967.

7. Court may grant relief—(1) Notwithstanding the provisions of section 6 of this Act, but subject to the express provisions of any other enactment, the Court may in the course of any proceedings, or on application made for the purpose, grant to—

(a) Any party to an illegal contract; or

(b) Any party to a contract who is disqualified from enforcing it by reason of the commission of an illegal act in the course of its performance; or

(c) Any person claiming through or under any such party—

such relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the Court in its discretion thinks just.

(2) An application under subsection (1) of this section may be made by—

(a) Any person to whom the Court may grant relief pursuant to subsection (1) of this section; or

(b) Any other person where it is material for that person to know whether relief will be granted under that subsection.

(3) In considering whether to grant relief under subsection (1) of this section the Court shall have regard to—

(a) The conduct of the parties; and

(b) In the case of a breach of an enactment, the object of the enactment and the gravity of the penalty expressly provided for any breach thereof; and

(c) Such other matters as it thinks proper;

but shall not grant relief if it considers that to do so would not be in the public interest.

(4) The Court may make an order under subsection(1) of this section notwithstanding that the person granted relief entered into the contract or committed an unlawful act or unlawfully omitted to do an act with knowledge of the facts or law giving rise to the illegality, but the Court shall take such knowledge into account in exercising its discretion under that subsection.

(5) The Court may by any order made under subsection (1) of this section vest any property that was the subject of, or the whole or part of the consideration for, an illegal contract in any party to the proceedings or may direct any such party to transfer or assign any such property to any other party to the proceedings.

(6) Any order made under subsection(1) of this section, or any provision of any such order, may be made upon and subject to such terms and conditions as the court thinks fit.

(7) Subject to the express provisions of any other enactment, no Court shall, in respect of any illegal contract, grant relief to any person otherwise than in accordance with the provisions of this Act.

8. Restraints of trade—Where any provision of any contract constitutes an unreasonable restraint of trade, the Court may—

(a) Delete the provision and give effect to the contract as so amended; or

(b) So modify the provision that at the time the contract was entered into the provision as modified would have been reasonable, and give effect to the contract as so modified; or

(c) Where the deletion or modification of the provision would so alter the bargain between the parties that it would be unreasonable to allow the contract to stand, decline to enforce the contract.

(2) The Court may modify a provision under paragraph (b) of subsection (1) of this section, notwithstanding that the modification cannot be effected by the deletion of words from the provision.

9. Jurisdiction of Magistrates' Courts—(1) A Magistrate's Court shall have jurisdiction to exercise any of the powers conferred by any of the provisions of section 7 and 8 of this Act in any case where—

(a) The occasion for the exercise of the power arises in the course of any civil proceedings (other than an application made for the purposes of subsection (1) of section 7 of this Act) properly before the Court; or

(b) The value of the consideration for the promise or act of any party to the contract is not more than $2,000; or

(c) The parties agree, in accordance with section 37 of the Magistrates' Court Act 1947, that a Magistrate's Court shall have jurisdiction to hear and determine the application.

(2) For the purposes of section 43 of the Magistrates' Court Act 1947, an application made to a Magistrate's Court pursuant to subsection (1) of section 7 of this Act shall be deemed to be an action.

10. Application of Act—This Act shall apply to contracts whether made before or after the commencement of this Act:

Provided that nothing in section 6 of this Act shall apply to contracts made before the commencement of this Act.

11. Savings—(1) Except as provided in section 8 of this Act, nothing in this Act shall affect the law relating to:

(a) Contract, or provisions of contracts, which are in restraint of trade; or

(b) Contract, or provisions of contract, which purport to oust the jurisdiction of any Court, whether that Court is a Court within the meaning of this Act or not.

(2) Nothing in this Act shall affect the right of any person to bring an action for breach of promise of marriage and every such action shall be heard and determined as if this Act had not been passed.

(3) Nothing in this Act shall affect the rights of the parties under any judgment given in any Court before the commencement of this Act, or under any judgment given on appeal from any such judgment, whether the appeal is commenced before or after the commencement of this Act.

APPENDIX D

CATEGORIES OF INVALIDATING CONTRACTS

In this Appendix, we have grouped the Sections listed in Appendix A according to the reason for which a contract is expressly invalidated. The word "Act" has been omitted for the sake of convenience. All references to provincial and federal enactments are to the 1979 and 1970 revisions respectively, except where otherwise noted.

Title	Chapter	Section(s)
1. Contracts Rendered Invalid Unless an Approval or Consent is Obtained		
(a) *Provincial*		
Infants	196	31
Insurance	200	121
Labour Code	212	6
Land	214	94
Land (Wife Protection)	223	3
Liquor Control and Licensing	237	19
Liquor Distribution	238	17
Municipal	290	237
Property Law	340	23
(b) *Federal*		
Banks and Banking Law Revision	S.C.1980-81, c.40	261, 273, 275
Canadian Co-operative Association	c.28.5 (1970-71-72, c.6)	48
Co-operative Credit Association	C-29	26
Indian	I-6	24, 32, 90
Canadian and British Insurance Companies	I-15	90
Land Titles	L-4	88
Loan Companies	L-12	91
National Energy Board	N-6	17
Pension	P-7	22
Telesat Canada	T-4	8
Department of Transport	T-15	15
Trust Companies	T-16	80, 82
2. Contracts Rendered Invalid to Promote the Specific Policy of an Enactment, or a Section of an Enactment		
(a) *Provincial*		
Community Care Facility	57	12
Company	59	306
Condominium	61	33
Consumer Protection	65	11, 12, 39
Credit Union	79	69
Funeral Plan	147	4
Human Tissue Gift	187	10
Insurance	200	8, 18, 129, 131, 189
Insurance (Marine)	203	5
Land	214	94
Land Tax Deferment	218	3
Land Title	219	218, 318
Municipal	290	535
Petroleum and Natural Gas	323	133
Railway	354	86, 220
Trading Stamp	407	2
Wills Variation	435	12
Workers Compensation	437	10
(b) *Federal*		
Bankruptcy	B-3	61
Quebec Savings Banks	B-4	39

Title	Chapter	Section(s)
Banks and Banking Law Revision		
Bills of Exchange	B-5	59
	(1980-81, c.40)	208
Canadian Wheat Board	C-12	43
Copyright	C-30	12
Canada Corporations	C-32	19
Customs	C-40	75
Employment Tax Credit	E-5.8	7
	(1977-78, c.4)	
Financial Administration	F-10	80
Patent	P-4	7
Public Service Staff Relations	P-35	43
Railway	R-2	21, 265
Canada Shipping	S-9	62
Telegraphs	T-3	39
Canada Temperance	T-5	108
Unemployment Insurance	U-2	48
	(1970-71-72, c.48)	
3. Contracts Invalid Against Creditors or Others by Reason of a Failure to Register		
(a) *Provincial*		
Book Accounts Assignment	32	13
Chattel Mortgage	48	15
Company	59	79
Sale of Goods on Condition	373	25
(b) *Federal*		
Canada Corporations	C-32	39, 184
Customs	C-40	75
Loan Companies	L-12	43
Patent	P-4	53
Railway	R-2	19
Telsat Canada	T-4	20
Trust Companies	T-16	36
4. Contracts Entered into to Avoid Creditors		
(a) *Provincial*		
Barristers and Solicitors	26	100
Builders Lien	40	18
Estate Administration	114	123
Fraudulent Conveyance	142	1
Fraudulent Preference	143	213
Land (Wife Protection)	223	3
Sale of Goods in Bulk	371	9
(b) *Federal*		
Bankruptcy	B-3	69, 70, 71, 73
Winding-Up	W-10	99
5. Contracts Rendered Invalid to Protect a Class of Persons		
(a) *Provincial*		
Consumer Protection (1967)	64	5, 16
Consumer Protection	65	35, 38, 39
Infants	196	17, 18, 21, 31
Insurance	200	121, 134, 137
Insurance (Motor Vehicle)	204	18
Patients Property	313	20
Pension (College)	316	19
Pension (Municipal)	317	18
Pension (Public Service)	318	21
Pension (Teachers)	320	18
Property Law	340	23

Title	Chapter	Section(s)
Residential Tenancy	365	7, 10
Sale of Goods	370	10, 20
Securities	380	74
Trade Practice	406	4
Wills Variation	435	12
(b) *Federal*		
Canada Pension Plan	C-5	64
Canadian Forces Superannuation	C-9	39
Indian	I-6	28
Old Age Security	O-6	21
Canada Shipping	S-9	192
6. Contracts in Respect of Which No Action may be Brought by Reason of the Effluxion of Time		
(a) *Provincial*		
Human Rights Code	186	6
Insurance	200	24
Insurance Corporation	201	68
Limitation	236	318
Sale of Goods in Bulk	371	11
Securities	380	60, 61, 67
(b) *Federal*		
Canada Shipping	S-9	536, 645
7. Contracts or Provisions in Contracts Invalid if not Evidenced in Writing		
(a) *Provincial*		
Consumer Protection (1967)	64	5
Consumer Protection	65	12
Insurance	200	14
Mineral	259	44
Municipal	290	856
Real Estate	356	46
Statute of Frauds	393	1, 2, 4, 5
(b) *Federal*		
Copyright	C-30	12
Customs	C-40	75
8. Contracts Invalidated which would Otherwise Have the Effect of Avoiding Statutory Requirements		
(a) *Provincial*		
Builders Lien	40	9
Chattel Mortgage	48	16
Income Tax	190	40
Real Estate	356	62
(b) *Federal*		
Pension Benefits Standards	P-8	18
Carriage by Air	C-14	Schedule 1, Article 23
9. Contracts Containing a Specific Objectional Provision Stated to be Invalid, but whose Invalidity does not Affect the Balance of the Contract		
(a) *Provincial*		
Barristers and Solicitors	26	99
Chattel Mortgage	48	25
Consumer Protection (1967)	64	23
Family Relations	121	48
Medical Practitioners	254	94
Mortgage Brokers	283	20
Residential Tenancy	365	7, 64
Sale of Goods	370	10, 20
Sale of Goods on Condition	373	22
Warehouse Receipt	428	3
Workers Compensation	437	13

Title	Chapter	Section(s)
(b) *Federal*		
Canada Corporations	C-32	79
Merchant Seamen Compensation	M-11	10
10. Contracts in Respect of Which no Action may be Brought Unless a Document is Registered		
(a) *Provincial*		
Property Law	340	6
Municipal	290	856
(b) *Federal*		
Quebec Savings Bank	B-4	39, 40
11. Contracts Invalid Unless Money is Appropriated by Parliament		
Federal		
Agricultural and Rural Development	A-4	8
Financial Administration	F-10	25
Fisheries Development	F-21	8
12. Contracts Rendered Invalid by Reason of the Creation or Vesting of a Right after a Specified Period of Time		
(a) *Provincial*		
Perpetuity	321	18, 19, 20
13. Contracts Avoided by Frustration		
(a) *Provincial*		
Frustrated Contract	144	4
14. Contracts which are Declared Unenforceable by a Board or Person		
(a) *Provincial*		
Labour Code	212	90
Land	214	49
Perpetuity	321	21
Residential Tenancy	365	10
Utilities Commission	421.5	70
(b) *Federal*		
Financial Administration	F-10	34
Native Claims Settlement	N-18.2 (1976-77, c.32)	4
Oil and Gas Production and Conservation	O-4	30
Western Grain Stabilization	C-87 (1974-75-76, c.87)	24

APPENDIX E

A Draft British Columbia Illegal Transaction Act

Interpretation

1. In this Act,

"court" means a court, tribunal, or arbitrator exercising its proper jurisdiction;

"enactment" includes an enactment as defined in the *Interpretation Act* (Canada);

"illegal transaction" means a transaction that in its formation, existence or performance, is null, void, illegal, unlawful, invalid, unenforceable, or otherwise ineffective, or in respect of which no action or proceeding may be brought, by reason of an enactment or of a rule of equity or common law respecting transactions that are contrary to public policy, but does not include a transaction that

(a) is invalid by reason only of a failure to register the transaction,
(b) is unenforceable by reason only of effluxion of time,
(c) is unenforceable by reason only of its not being in writing or signed by the party to be charged, or his agent,
(d) is invalid by reason only of the creation or vesting of a right after a specified period,
(e) is invalid by reason only that it is in restraint of trade, or
(f) is avoided by frustration;

"performance" means the intended, actual or stipulated performance of an obligation under a transaction;

"property" means any type of obligation, power, interest, right or thing that has been or may be transferred under, or which is otherwise affected by an illegal transaction;

"transaction" means a contract, trust, or arrangement or any provision of a contract, trust or arrangement and includes a disposition of property and any instrument effecting or evidencing a disposition of property.

Application

2. This Act applies in respect of an illegal transaction whether or not:

(a) the transaction was entered into before or after this Act comes into force, or
(b) the provision of the transaction that renders it illegal is severable by the deletion of words or otherwise,

but does not apply where the enactment by reason of which the transaction is illegal provides for relief.

Statutory Illegality

3. A transaction shall not be considered an illegal transaction by reason only that its formation, existence or performance contravenes an enactment or defeats its purpose unless the enactment, or the furtherance of that purpose, clearly so requires.

Exclusion of Other Remedies

4. No remedy shall be granted by a court to any person involved in an illegal transaction in respect of the illegal transaction, or in respect of property, except as provided by this Act or by the enactment by reason of which the transaction is illegal.

Remedies

5. (1) In a proceeding in respect of an illegal transaction, or property, the court may, by order, grant one or more of the following remedies

(a) restitution,

(b) compensation by way of damages or otherwise,

(c) apportionment of any loss arising from the formation or performance of the transaction, other than loss of profit;

(d) a declaration;

(e) an order vesting property in any person or directing a person to assign or transfer property to another;

(f) where the court is satisfied that one or more of the obligations or rights under the transaction are reasonable,

(i) a declaration that those obligations constitute an enforceable transaction, or

(ii) an order that those obligations be discharged in a lawful manner specified by the court;

(g) any other remedy the court could have granted under common law or equity had the transaction not been an illegal transaction.

(2) The court may impose any conditions it thinks fit in an order under this section.

Discretionary Factors

6. (1) In granting or refusing an order under section 5, the court may consider

(a) the public interest,

(b) the circumstances of the the formation or performance of the illegal transaction, including the intent, knowledge, conduct and relationship of the parties,

(c) if any party to the illegal transaction was, at a material time, acting under a mistake of fact or law,

(d) the extent to which the illegal transaction has been performed,

(e) if the enactment by reason of which the transaction is illegal has been substantially complied with,

(f) the consequences of denying a remedy,

(g) any other factor the court considers relevant.

(2) In granting or refusing an order in respect of an illegal transaction that was entered into before this Act came into force, the court, in addition to the factors it may consider under subsection (1), shall consider whether or not

(a) a party to the transaction has so altered his position that granting a remedy would, in the circumstances be inequitable,

(b) another proceeding has been commenced in respect of the transaction, and

(c) a party to the transaction has compromised a claim in respect of the transaction.

Commencement

7. This Act comes into force by regulation of the Lieutenant Governor in Council.

Queen's Printer for British Columbia ©
Victoria, 1984

M50-387